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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 54

[TD 9949]

RIN 1545-BP17

Application of the Employer Shared Responsibility Provisions and Certain Nondiscrimination Rules to Health Reimbursement Arrangements and Other Account-Based Group Health Plans Integrated with Individual Health Insurance Coverage or Medicare

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document sets forth final regulations to clarify the application of the employer shared responsibility provisions and certain nondiscrimination rules under the Internal Revenue Code (Code) to health reimbursement arrangements (HRAs) and other account-based group health plans integrated with individual health insurance coverage or Medicare (individual coverage HRAs), and to provide certain safe harbors with respect to the application of those provisions to individual coverage HRAs. The final regulations affect employers, employees and their family members, plan sponsors, and health insurance issuers that offer individual health insurance coverage.

DATES: Effective Date: The final regulations contained in this document are effective on **[INSERT DATE OF FILING IN THE FEDERAL REGISTER]**.

Applicability Date: For dates of applicability, see §§1.105-11(j) and 54.4980H-5(h). See SUPPLEMENTARY INFORMATION for an in-depth discussion.

FOR FURTHER INFORMATION CONTACT: Jennifer Solomon at (202) 317-5500 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

A. Individual Coverage HRAs and Related Guidance

On October 12, 2017, President Trump issued Executive Order 13813, “Promoting Healthcare Choice and Competition Across the United States.”¹ The Executive Order directed the Secretaries of the Treasury, Labor, and Health and Human Services to “consider proposing regulations or revising guidance, to the extent permitted by law and supported by sound policy, to increase the usability of HRAs, to expand employers’ ability to offer HRAs to their employees, and to allow HRAs to be used in conjunction with nongroup coverage.”² In response to the Executive Order, on October 23, 2018, the Departments of the Treasury, Labor, and Health and Human Services (the Departments) issued proposed regulations³ under Public Health Service Act (PHS Act) section 2711 and the health nondiscrimination provisions⁴ of the Health Insurance Portability and Accountability Act of 1996 (HIPAA)⁵ and the Patient Protection and Affordable

¹ 82 FR 48385 (Oct. 17, 2017).

² Id.

³ See 83 FR 54420 (Oct. 29, 2018).

⁴ See Code sections 9802 and 9815, Employee Retirement Income Security Act (ERISA) sections 702 and 715, and PHS Act section 2705. Although Code section 9802 and ERISA section 702 were not amended by PPACA, the requirements of PHS Act section 2705 were also incorporated by reference into the Code by Code section 9815 and into ERISA by ERISA section 715. PPACA section 1201 moved the PHS Act nondiscrimination provisions from section 2702 to section 2705, with some modifications.

⁵ Public Law 104-191.

Care Act,⁶ as amended by the Health Care Education and Reconciliation Act of 2010⁷ (collectively, PPACA) (proposed integration regulations). The proposed integration regulations included a proposal to expand the potential use of HRAs and other account-based group health plans⁸ (collectively referred to in this preamble as HRAs) by allowing the integration of HRAs with individual health insurance coverage, subject to certain conditions. For purposes of this preamble, these arrangements are referred to as individual coverage HRAs.

On June 14, 2019, the Departments finalized the proposed integration regulations with certain modifications in response to comments (the final integration regulations).⁹ The final integration regulations apply for plan years beginning on or after January 1, 2020.

B. Premium Tax Credit (Section 36B)

Section 36B allows the premium tax credit (PTC) to certain taxpayers to help with the cost of individual health insurance coverage enrolled in through an Exchange.¹⁰ Under section 36B(a) and (b)(1), and §1.36B-3(d), a taxpayer's PTC is the sum of the premium assistance amounts for all months for which the individual satisfies various requirements and is

⁶ Public Law 111-148.

⁷ Public Law 111-152.

⁸ See §54.9815-2711(d)(6)(i) for the definition of an account-based group health plan. This term does not include qualified small employer health reimbursement arrangements (QSEHRAs) (as defined under section 9831(d)), medical savings accounts (see section 220), or health savings accounts (see section 223). In addition, for purposes of the integration regulations (both proposed and final), the definition does not include an employer arrangement that reimburses the cost of individual health insurance coverage in a cafeteria plan under section 125.

⁹ See 84 FR 28888 (June 20, 2019). In addition to the final integration regulations: (1) the Departments issued final regulations setting forth conditions under which certain HRAs will be recognized as limited excepted benefits; (2) the Department of Health and Human Services (HHS) issued final regulations to provide a special enrollment period in the individual market for individuals who newly gain access to an individual coverage HRA or who are newly provided a QSEHRA; (3) the Department of Labor (DOL) finalized a safe harbor to provide assurance that the individual health insurance coverage for which premiums are reimbursed by an HRA or a QSEHRA does not become part of an ERISA plan, provided certain conditions are satisfied (and the Departments provided a related clarification of the definition of the term "group health insurance coverage"); and (4) the Treasury Department and the IRS finalized regulations regarding premium tax credit eligibility for individuals offered an individual coverage HRA, as explained in this part of this preamble.

¹⁰ Exchanges are entities established under PPACA section 1311 or 1321, through which qualified individuals and qualified employers can purchase health coverage.

therefore eligible for the PTC (coverage months) during the taxable year for individuals in the taxpayer's family.

Among other requirements, under section 36B(c)(2), a month is not a coverage month for an individual if either: (1) the individual is eligible for coverage under an eligible employer-sponsored plan that provides minimum essential coverage (MEC) and that coverage is affordable and provides minimum value (MV); or (2) the individual enrolls in an eligible employer-sponsored plan that provides MEC, even if the coverage is not affordable or does not provide MV.¹¹

In general, an eligible employer-sponsored plan is affordable for an employee if the amount the employee must pay for self-only coverage, whether by salary reduction or otherwise, (the employee's required contribution) for the plan does not exceed a percentage (the required contribution percentage¹²) of the employee's household income.¹³ In addition, in general, an eligible employer-sponsored plan provides MV if the plan's share of the total allowed costs of benefits provided under the plan is at least 60 percent of the costs and if the plan provides substantial coverage of inpatient hospitalization and physician services.¹⁴

An eligible employer-sponsored plan includes coverage under a self-insured group health plan¹⁵ and provides MEC unless it consists solely of excepted benefits.¹⁶ An HRA is a self-insured group health plan and, therefore, is an eligible employer-sponsored plan that provides MEC unless it consists solely of excepted benefits.¹⁷ Accordingly, an individual who, for any

¹¹ See section 36B(c)(2)(C)(iii) and §§1.36B-2(c)(3) and 1.36B-3(c).

¹² See §1.36B-2(c)(3)(v)(C). The required contribution percentage for 2020 is 9.78 percent (see Rev. Proc. 2019-29). The required contribution percentage for 2021 is 9.83 percent (see Rev. Proc. 2020-36).

¹³ See section 36B(c)(2)(C) and §1.36B-2(c)(3)(v)(A)(1) and (2). See §1.36B-2(c)(3)(v)(A)(3) for a safe harbor that, in certain circumstances, allows an employee to claim the PTC even if the offer of coverage ultimately is affordable.

¹⁴ See section 36B(c)(2)(C)(ii); see also 80 FR 52678 (Sept. 1, 2015).

¹⁵ See §1.5000A-2(c).

¹⁶ See section 5000A(f)(3) and §1.5000A-2(g).

¹⁷ See Notice 2013-54, 2013-40 IRB 287, Q&A 10.

month is (1) covered by an individual coverage HRA, or (2) eligible for an individual coverage HRA that is affordable and provides MV, is ineligible for the PTC for individual health insurance coverage through an Exchange for that month.

On October 23, 2018, in connection with the proposed integration regulations, the Treasury Department and the IRS proposed regulations under section 36B to provide guidance regarding the circumstances in which an individual coverage HRA would be considered to be affordable and to provide MV. On June 14, 2019, in connection with the final integration regulations, the Treasury Department and the IRS finalized the rules under section 36B substantially as proposed but with some clarifications in response to comments (the final PTC regulations).¹⁸

Under the final PTC regulations, an individual coverage HRA is considered to be affordable for a month if the employee's required HRA contribution for the month does not exceed 1/12 of the product of the employee's household income for the taxable year and the required contribution percentage. The required HRA contribution is the excess of: (1) the monthly premium for the lowest cost silver plan for self-only coverage of the employee offered in the Exchange for the rating area in which the employee resides (the PTC affordability plan¹⁹), over (2) in general, the self-only amount the employer makes newly available to the employee under the individual coverage HRA for the month (the monthly HRA amount).²⁰ Under the final

¹⁸ See 84 FR 28888 (June 20, 2019).

¹⁹ The term "affordability plan" is also used in this preamble and refers to the lowest cost silver plan used to determine affordability of an individual coverage HRA, which for purposes of section 36B means the PTC affordability plan and for section 4980H means either the PTC affordability plan or the lowest cost silver plan determined under the safe harbors provided in the final regulations, if applicable.

²⁰ See §1.36B-2(c)(5)(ii) for more information regarding how the required HRA contribution is determined, including in cases in which the employer makes the same amount available for all employees regardless of the number of individuals covered.

PTC regulations, an individual coverage HRA that is affordable is treated as providing MV. The final PTC regulations apply for taxable years beginning on or after January 1, 2020.

C. Employer Shared Responsibility Provisions (Section 4980H)

1. In General

The employer shared responsibility provisions under section 4980H apply to an employer that is an applicable large employer (ALE). In general, an employer is an ALE for a calendar year if it had an average of 50 or more full-time employees (including full-time equivalent employees) during the preceding calendar year.²¹

For any month, an ALE may be liable for an employer shared responsibility payment under either section 4980H(a) or 4980H(b), or neither, but an ALE may not be liable for a payment under both paragraphs 4980H(a) and 4980H(b).²² An ALE generally is liable for a payment under section 4980H(a) for a month if it fails to offer coverage under an eligible employer-sponsored plan to at least 95 percent of its full-time employees (and their dependents) and at least one full-time employee is allowed the PTC for purchasing individual health insurance coverage through an Exchange. An ALE is liable for a payment under section 4980H(b) for a month if it offers coverage under an eligible employer-sponsored plan to at least 95 percent²³ of its full-time employees (and their dependents), but at least one full-time employee is allowed the PTC for purchasing individual health insurance coverage through an

²¹ See section 4980H(c)(2) and §54.4980H-2. See also §54.4980H-1(a) for definitions of the terms used in this preamble.

²² For simplicity, this preamble refers to ALEs and employers interchangeably, but to the extent the preamble is addressing the potential for liability under section 4980H, those terms refer to an ALE member. An ALE member is a person that, together with one or more other persons, is treated as a single employer that is an ALE, if applicable. Liability under section 4980H applies separately to each ALE member. See §54.4980H-1(a)(5). Further, the reporting obligations under section 6056 also apply to ALE members and references to employers or ALEs with respect to reporting under section 6056 should be read to refer to ALE members.

²³ If an ALE offers coverage to all but five of its full-time employees (and their dependents), and five is greater than five percent of the employer's full-time employees, the employer will not be liable for an employer shared responsibility payment under section 4980H(a). See §54.4980H-4.

Exchange, which may occur because the ALE did not offer coverage to that particular full-time employee or because the coverage the employer offered was unaffordable or did not provide MV.²⁴

2. Section 4980H Affordability Safe Harbors Regarding Household Income

Whether an employee may claim the PTC depends on the rules under section 36B, including the rules for whether an offer of coverage by the employer is affordable and provides MV.²⁵ However, the regulations under section 4980H provide certain safe harbors for determining whether an ALE is treated as making an offer of coverage that is affordable for purposes of section 4980H. More specifically, as noted in part I(B) of this preamble, whether an offer of an eligible employer-sponsored plan is affordable, both for purposes of section 36B and section 4980H, depends in part on the employee's household income. Because an employer generally does not know an employee's household income, §54.4980H-5(e) provides that, for purposes of section 4980H(b), an employer may substitute for an employee's household income an amount based on the employee's wages from the Form W-2, "Wage and Tax Statement," the employee's rate of pay, or the federal poverty line, which are the household income safe harbors (the HHI safe harbors).²⁶

The HHI safe harbors are optional and apply only for purposes of section 4980H(b). An ALE may choose to use one or more of the HHI safe harbors for all of its employees or for any reasonable category of employees, provided it does so on a uniform and consistent basis for all employees in a category. In addition, an ALE may use an HHI safe harbor only if the ALE offers its full-time employees and their dependents eligible employer-sponsored coverage that provides

²⁴ See §54.4980H-5.

²⁵ See section 4980H(c)(3). See also §§54.4980H-1(a)(28) and 54.4980H-5(e)(1).

²⁶ Whether an employee has been offered affordable coverage for purposes of eligibility for the PTC is determined under section 36B(c)(2)(C)(i) and the regulations thereunder (as opposed to the section 4980H regulations).

MV with respect to the self-only coverage offered to the employee. If, in applying one of the HHI safe harbors, the offer of coverage is considered affordable, then the employer will not be subject to an employer shared responsibility payment under section 4980H(b) with respect to that employee, even if the employee is allowed the PTC.

3. Application of Section 4980H to Individual Coverage HRAs

In implementing the objectives of Executive Order 13813, the Treasury Department and the IRS considered the application of section 4980H to an ALE that offers an individual coverage HRA. Accordingly, on November 19, 2018, the Treasury Department and the IRS issued Notice 2018-88,²⁷ which described a number of potential approaches related to the interaction of the proposed integration regulations and section 4980H.

For clarity, the notice confirmed that an individual coverage HRA is an eligible employer-sponsored plan, and, therefore, an offer of an individual coverage HRA constitutes an offer of an eligible employer-sponsored plan for purposes of section 4980H(a). Consequently, if an ALE offers an eligible employer-sponsored plan to at least 95 percent of its full-time employees (and their dependents), which would include those full-time employees to whom the employer offers an individual coverage HRA, the ALE will not be liable for an employer shared responsibility payment under section 4980H(a) for the month, regardless of whether any full-time employee is allowed the PTC.

The notice also explained how section 4980H(b) (including the HHI safe harbors) would apply to an ALE that offers an individual coverage HRA, described potential additional affordability safe harbors related to offers of individual coverage HRAs, requested comments, and provided examples.

²⁷ See Notice 2018-88, 2018-49 IRB 817.

D. Section 105

In general, section 105(b) excludes from gross income amounts received by an employee through employer-provided accident or health insurance if those amounts are paid to reimburse expenses for medical care (as defined in section 213(d)) incurred by the employee (for medical care of the employee, the employee's spouse, or the employee's dependents, as well as children of the employee who are not dependents but have not attained age 27 by the end of the taxable year) for personal injuries and sickness.

Section 105(h) provides, however, that excess reimbursements (as defined in section 105(h)(7)) paid to a highly compensated individual (as defined in section 105(h)(5) and §1.105-11(d)) (an HCI)²⁸ under a self-insured medical reimbursement plan are includible in the gross income of the HCI if either (1) the plan discriminates in favor of HCIs as to eligibility to participate in the plan, or (2) the benefits provided under the plan discriminate in favor of HCIs (nondiscriminatory benefits rule).²⁹ Section 105(h)(4) provides that a self-insured medical reimbursement plan does not satisfy the nondiscriminatory benefits rule unless all benefits provided to HCIs are also provided to all other participants.³⁰ However, a plan that reimburses employees solely for premiums paid under an insured plan is treated as an insured plan and is not subject to these rules.³¹

Consistent with section 105(h)(4), the regulations under section 105(h) provide that, in order to satisfy the nondiscriminatory benefits rule, all benefits made available under a self-insured medical reimbursement plan to an HCI (and the HCI's dependents) must also be made

²⁸ Generally, section 105(h)(5) and §1.105-11(d) define an HCI to include any employee that is among the highest paid 25 percent of all employees (including the five highest paid officers, but not including employees excludable under §1.105-11(c)(2)(iii) who are not participants in any self-insured medical reimbursement plan of the employer).

²⁹ See section 105(h)(1) and (2).

³⁰ See §1.105-11(c)(3)(i).

³¹ See §1.105-11(b)(2).

available to all other participants (and their dependents).³² In addition, the regulations provide that “any maximum limit attributable to employer contributions must be uniform for all participants and for all dependents of employees who are participants and may not be modified by reason of a participant’s age or years of service.”³³ The consequence of a plan failing to satisfy the nondiscriminatory benefits rule is that any excess reimbursements paid under the plan to an HCI are includible in the gross income and wages of the HCI.

HRAs generally are subject to the rules under section 105(h) and its related regulations because they are self-insured medical reimbursement plans.³⁴ However, HRAs that make available reimbursements to employees only for premiums used to purchase health insurance policies, including individual health insurance policies, but not other expenses, are not subject to the rules under section 105(h) and its related regulations.³⁵ Notice 2018-88 addressed the interaction of individual coverage HRAs and section 105(h) and explained potential future guidance.

E. Proposed Regulations

Taking into account all of the comments received in response to Notice 2018-88, on September 30, 2019, the Treasury Department and the IRS released a notice of proposed rulemaking (REG-136401-18, 84 FR 51471) regarding proposed safe harbors under

³² See §1.105-11(c)(3)(i).

³³ *Id.*

³⁴ See §1.105-11(b)(1); see also Notice 2002-45, 2002-28 CB 93.

³⁵ See §1.105-11(b)(2). HRAs that provide for the reimbursement of premiums to purchase health insurance policies in addition to other medical care expenses are subject to the rules under section 105(h) and the regulations thereunder because the HRA amounts may be used to reimburse medical care expenses other than premiums for health insurance policies. PHS Act section 2716, as incorporated into the Code by section 9815, applies nondiscrimination rules similar to section 105(h) to insured coverage and may apply to HRAs that only provide for the reimbursement of premiums. However, under Notice 2011-1, 2011-2 IRB 259, the Departments determined that compliance with PHS Act section 2716 should not be required (and, thus, any sanctions for failure to comply would not apply) until after regulations or other administrative guidance of general applicability has been issued under PHS Act section 2716.

sections 4980H and 105(h) (the proposed regulations). Written and electronic comments responding to the proposed regulations were received. The comments are available for public inspection at *www.regulations.gov* or upon request. After consideration of all of the comments, the proposed regulations are adopted as amended in the final regulations. The amendments are discussed in this preamble.

II. Explanation of Provisions and Summary of Comments

Taking into account the comments received in response to the proposed regulations, the Treasury Department and the IRS issue the following regulations under sections 4980H and 105 to clarify the application of those sections to individual coverage HRAs and to provide related safe harbors to ease the administrative burdens of avoiding liability under section 4980H and avoiding income inclusion under section 105(h). The final regulations do not include any changes to the final integration regulations or the final PTC regulations. The Treasury Department and the IRS note that, while the safe harbors provided under the final regulations are voluntary, the taxpayer, not the IRS, is responsible for determining whether a safe harbor is applicable and for ensuring that the use of a safe harbor is properly reported.³⁶

A. Section 4980H Final Regulations

The Treasury Department and the IRS note that section 4980H relates only to offers of coverage by an ALE to its full-time employees (and their dependents). As a result, to the extent an employer is not an ALE, or is an ALE but offers an individual coverage HRA only to employees who are not full-time employees, the employer need not consider the application of section 4980H in determining those offers, and, therefore, an affordability plan is not relevant for those employees.

³⁶ For information regarding reporting requirements under sections 6055 and 6056, see part II(A)(7) of this preamble.

1. Location-Related Issues

a. Location Safe Harbor – In General

As noted earlier in part I(B) of this preamble, under the final PTC regulations, whether an offer of an individual coverage HRA is affordable for an employee depends, in part, on the monthly premium for the PTC affordability plan for that employee (that is, the lowest cost silver plan for self-only coverage of the employee offered through the Exchange for the rating area in which the employee resides). In Notice 2018-88, the Treasury Department and the IRS expressed concerns about the burdens on employers that could result from requiring affordability to be determined based on each employee's place of residence, noting that employees' places of residence might change over time and employers may have difficulty keeping their records up to date. Accordingly, Notice 2018-88 described a potential safe harbor, and the proposed regulations proposed a safe harbor, under which, for purposes of determining affordability under section 4980H(b), an ALE would be allowed to use the lowest cost silver plan for the employee for self-only coverage offered through the Exchange in the rating area in which the employee's primary site of employment³⁷ is located (the location safe harbor), instead of the lowest cost silver plan for the employee in the rating area in which the employee resides. The Treasury Department and the IRS requested comments on the location safe harbor.

Some commenters on the proposed regulations opposed the location safe harbor and stated that the proposed location safe harbor should be eliminated, just as one commenter on Notice 2018-88 opposed the potential location safe harbor described in Notice 2018-88, asserting that employers likely will want to determine affordability based on the cost of the lowest cost silver plan for the rating area in which the employee resides. One commenter on the proposed

³⁷ See part II(A)(1)(b) of this preamble for a discussion of the rules for determining an employee's primary site of employment.

regulations stated that the location safe harbor appeared unnecessary because employee addresses are readily available to employers. One commenter expressed that they continue to have concerns about the utility of the location safe harbor for large employers with multiple worksites.

Some commenters on the proposed regulations supported the location safe harbor but requested an expanded location safe harbor to reduce the administrative burden on larger employers, such as an employer-wide, statewide, or nationwide safe harbor, just as some commenters on Notice 2018-88 requested an expanded location safe harbor. However, some commenters on the proposed regulations stated that the final regulations should not include a broadened location safe harbor, citing concerns regarding the potential for evasion of section 4980H and the possibility that the location safe harbor would enable contributions to individual coverage HRAs that would be significantly divorced from the premiums employees actually would be required to pay based on their geography. Moreover, one commenter suggested that the affordability standard for the individual coverage HRA is unfair because, for an individual with household income at 150 percent of the federal poverty line, the standard could require the individual to pay 9.86 percent of the employee's household income in 2020 for the lowest cost silver plan on the Exchange while the same individual would need to pay only 4 percent of household income for the second lowest cost silver plan on an Exchange if he or she were eligible for the PTC because he or she was not offered affordable coverage by the individual coverage HRA. This commenter stated that the proposed section 4980H safe harbors would further bend the affordability standard for purposes of section 4980H in a direction that would disadvantage individuals otherwise eligible for the PTC.

As a general matter, the Treasury Department and the IRS acknowledge that in determining the affordability of traditional employer-sponsored coverage, employers generally use the cost of one plan (that is, the lowest cost plan providing MV that the employer offers to its employees) and that the cost of that plan does not vary by employee (or, in general, varies by broad categories of employees). In contrast, by virtue of the fact that the cost of individual health insurance coverage varies on an individual basis, including based on the individual's age and the rating area of an individual's residence, the affordability test for individual coverage HRAs is based on the cost of the applicable lowest cost silver plan for each employee, which will vary by employee. The Treasury Department and the IRS recognize that this difference may impose additional complexity with respect to the application of section 4980H to individual coverage HRAs, as compared to its application to traditional employer-sponsored coverage. However, for purposes of section 36B, whether coverage is affordable is an employee-by-employee determination, and for an individual coverage HRA, where there is no traditional employer-sponsored coverage to be used to determine the employee contribution, the employee's required contribution must be based on the cost of an individual health insurance plan, as employees generally are required to have individual health insurance coverage in order to enroll in the individual coverage HRA. The Treasury Department and the IRS have considered ways in which, consistent with the law, application of the affordability test under the final PTC regulations can and should be modified in applying section 4980H. By virtue of the ways in which individual coverage HRAs differ from traditional employer-sponsored coverage, however, the determination of affordability under section 36B (and, accordingly, under section 4980H) differs for these two types of coverage, and the Treasury Department and the IRS expect that

employers will take those differences into account in determining whether, and to whom, to offer an individual coverage HRA, within the parameters of the final integration regulations.

The Treasury Department and the IRS continue to be concerned about the burden imposed on employers in determining each full-time employee's place of residence, due to the fact that employees' places of residence might change with some frequency, and it could be difficult for employers to keep their records up to date. The Treasury Department and the IRS also recognize the administrative simplicity for employers with workers in different locations of being able to use the cost of a single plan to determine affordability for all workers. However, none of the suggested expansions of the location safe harbor would be based on a reasonable proxy for the cost that would determine whether the employee would be allowed the PTC (which is the basis for the employer shared responsibility payment under section 4980H(b)), and none would provide a substitute for a cost that the employer would otherwise be unable to identify in advance of the plan year. As a result, adoption of any of the suggested expansions of the location safe harbor could lead to a significant number of additional cases in which one or more of an ALE's full-time employees are allowed the PTC while the ALE is treated as providing those full-time employees affordable coverage, with the result that the ALE is not liable for an employer shared responsibility payment.

These concerns are particularly acute because of significant differences in individual health insurance plan premiums that exist in different geographic locations, including from rating area to rating area, not only across the country, but also within many states. Accordingly, an affordability plan based on a nationwide average cost or, in many cases, a statewide average cost, would allow an ALE with full-time employees in locations with above-average lowest cost silver plan premiums to offer an individual coverage HRA, the amount of which is based on an

affordability calculation using the lower average cost for the state or nation. The ALE could then ensure that employees were informed of the ability to enroll in an Exchange plan subsidized by a potentially larger PTC, if they declined the individual coverage HRA. In that case, the ALE would not only avoid an employer shared responsibility payment, but also would avoid the cost of funding the employees' individual coverage HRAs (or any other healthcare benefits). Meanwhile, those employers with employees in below-average cost locations generally could use the actual cost in those lower-cost locations to determine affordability for those employees.³⁸ This result would run counter to the language and intent of section 4980H, which directly ties liability for an employer shared responsibility payment to one or more full-time employees being allowed the PTC.

The Treasury Department and the IRS recognize that a safe harbor based on the employee's primary site of employment could raise similar issues of avoidance of the employer shared responsibility payment, but it would be on a much more limited scale. It is possible that the premium for the lowest cost silver plan based on an employee's worksite will be more expensive or less expensive than the premium for the lowest cost silver plan based on the employee's residence, in cases in which the employee resides in a location that has a different lowest cost silver plan than the location in which the worksite is located. However, the Treasury Department and the IRS expect that, with respect to employees who work at or are assigned to a worksite, many of those employees will live in relatively close proximity to where they work, in which case it is likely that the location used to determine the affordability plan for purposes of sections 4980H and 36B would be the same. Further, the Treasury Department and the IRS also

³⁸ The Treasury Department and the IRS note that, in addition to considering section 4980H, employers will also need to take into account other applicable guidance in determining amounts to make available in individual coverage HRAs, including the same terms requirement (§54.9802-4(c)(3)) under the final integration regulations.

expect that even if an employee does not live and work in the same location for purposes of determination of the lowest cost silver plan, the employee is likely to live and work in locations that are relatively close, in which case the variation between the cost of the lowest cost silver plan where the employee lives versus the cost of the lowest cost silver plan where the employee works is likely to be less significant than the variation that would be introduced by a statewide or national average plan cost.

For these reasons, the Treasury Department and the IRS have concluded that for employees who work at or are assigned to a workplace, the cost of the affordability plan at an employee's primary site of employment is a reasonable proxy for the cost of the affordability plan at the employee's residence for purposes of section 4980H, while avoiding the burdens that may arise for some employers in keeping records of their employees' current residences. Therefore, consistent with the proposed regulations, the final regulations provide that for purposes of section 4980H(b), an employer may use the lowest cost silver plan for the employee for self-only coverage offered through the Exchange where the employee's primary site of employment is located for determining whether an offer of an individual coverage HRA to a full-time employee is affordable. Further, consistent with the proposed regulations, the final regulations provide that the location safe harbor may be used in combination with the other safe harbors provided in the final regulations.

In response to comments asking for a single affordability plan for purposes of section 4980H, the Treasury Department and the IRS note that an ALE that wants to contribute one set amount to individual coverage HRAs that would protect the ALE from liability under section 4980H(b) could set the amount by determining affordability based on the lowest cost silver plan that has the highest cost premium for self-only coverage for any of its full-time

employees (that is, nationally or based on multiple rating areas or states). This approach would result, however, in employees who live in locations with lower premiums receiving a benefit beyond the minimum required to protect against liability under section 4980H (and, thus, a higher cost to the employer than necessary solely to protect against that liability), which could possibly result in those same employees being able to purchase more generous plans than employees living in the higher-premium locations.

In addition, in response to the comment explaining that there is a discrepancy between the affordability standard applicable to health insurance purchased on the Exchange and that applicable to employer-sponsored health coverage, including an individual coverage HRA, the Treasury Department and the IRS note that the discrepancy exists as a result of the statutory language of section 36B regarding the PTC. The situation described by the commenters is no different than if the employer offered the employee a traditional group health plan that provided affordable MV coverage instead of an individual coverage HRA. Under section 36B, if an employer offers an employee a traditional group health plan providing MV with an employee contribution of less than or equal to 9.83 percent of the employee's household income in 2021, even if the plan was a bronze plan, the plan would be considered affordable and the employee would be ineligible for the PTC for individual health insurance coverage through an Exchange. The employee would be ineligible for the PTC regardless of whether he or she might otherwise be able to purchase coverage through an Exchange at a lower percentage of household income due to the PTC.

b. Identifying the Primary Site of Employment under the Location Safe Harbor

For purposes of the location safe harbor, the proposed regulations provided that an employee's primary site of employment generally is the location at which the employer

reasonably expects the employee to perform services on the first day of the plan year (or on the first day the individual coverage HRA may take effect, for an employee who is not eligible for the individual coverage HRA on the first day of the plan year), except that the employee's primary site of employment is treated as changing if the location at which the employee performs services changes and the employer expects the change to be permanent or indefinite.³⁹ In that case, in general, the employee's primary site of employment is treated as changing no later than the first day of the second calendar month after the employee has begun performing services at the new location. This rule was intended to strike the appropriate balance between requiring that employee-specific, up-to-date information be used to determine affordability under section 4980H and allowing employers time to address the administrative aspects of accounting for an employee's change in primary site of employment.

The proposed regulations also included a special rule for determining the primary site of employment for the first plan year that an employer offers an individual coverage HRA (or first offers an individual coverage HRA to a particular class of employees). Specifically, if an employer is first offering an individual coverage HRA to a class of employees,⁴⁰ and the change in the primary site of employment occurs prior to the individual coverage HRA's initial plan year, the employee's primary site of employment is treated as changing no later than the later of the first day of the plan year or the first day of the second calendar month after the employee has begun performing services at the new location. This special rule is intended to provide certainty

³⁹ The final integration regulations allow individual coverage HRA offers to vary based on different classes of employees. One permissible class of employees, as set forth in §54.9802-4(d)(2)(v), is employees whose primary site of employment is in the same rating area (with rating area defined in 45 CFR 147.102(b)). The final integration regulations do not provide a specific definition for primary site of employment, and the definition provided in the final regulations applies only for purposes of section 4980H.

⁴⁰ For clarity, the Treasury Department and the IRS note that this special rule also applies for an initial offer of coverage after a period during which a plan sponsor does not offer an individual coverage HRA to a class of employees.

to employers first offering individual coverage HRAs to account for changes in circumstances that may occur in the months leading up to the plan year, including in close proximity to the first day of the plan year. For subsequent plan years, employers are required to follow the generally applicable standard and should take into account, for instance, changes in residence after an open enrollment period has ended but before the beginning of the plan year.

The proposed regulations provided that in the case of an employee who regularly works from home or at another worksite that is not on the employer's premises but who may be required by his or her employer to work at, or report to, a particular worksite, such as a teleworker with an assigned office space, the worksite to which the employee would report to provide services if requested is the applicable primary site of employment. The proposed regulations also provided that in the case of an employee who works remotely from home or at another worksite that is not on the employer's premises and who otherwise does not have a particular assigned office space or a worksite to which to report, the employee's residence is the primary site of employment.

The Treasury Department and the IRS recognize that the manner in which employees report to work varies widely across employers and industries. Therefore, the Treasury Department and the IRS requested comments on whether any further clarification is needed regarding determination of the primary site of employment for purposes of the section 4980H location safe harbor.

Some commenters raised concerns about mid-year changes in worksite locations and requested that employers not be required to change the affordability calculation mid-year if an employee's worksite changes. One commenter stated that if annual determinations are not sufficient, employers should be required to determine location only twice per year.

The final regulations retain the proposed requirement that the employee's primary site of employment is treated as changing if the location at which the employee may be required to perform services changes and the employer expects the change to be permanent or indefinite. Because an employer has knowledge of an employee's primary site of employment and should be involved with any change in an employee's primary site of employment even if initiated by the employee, the Treasury Department and the IRS are of the view that employers are capable of planning ahead and adjusting individual coverage HRA contribution amounts in connection with changes to worksite locations. Moreover, while an employer may not have timely information about a change in the location of an employee's residence, the employer knows the location where the employer may require the employee to work.

Commenters also raised a number of questions and suggestions as to how to determine the primary site of employment for employees who telework. One commenter requested that a nationwide or employer-wide location safe harbor be available for employees who exclusively telework. One commenter suggested that a de minimis standard be created, such that an employer would be allowed to use the lowest-cost silver plan premium in the employer's headquarters for the purpose of determining affordability if less than 20 percent of the employees who are offered an individual coverage HRA work from home or at an off-premises worksite. One commenter suggested that a better standard of how to measure an employee's primary site of employment, particularly for telework, would be a measure of time spent working at one location versus another. Another commenter stated that the proposed rule for teleworkers is too complicated, and a simpler approach would be to allow the employer a safe harbor treating an offer of coverage under an individual coverage HRA as affordable if the HRA contribution is at

least the same as the employer contribution for an “affordable health plan” for a similarly situated individual in the primary site of employment.

The Treasury Department and the IRS have concluded that the concerns raised by commenters are addressed by the flexibilities included in the proposed regulations. Moreover, adoption of the suggestions raised by commenters would not result in a safe harbor that would be a reasonable proxy for the actual cost of the lowest cost silver plan available to an employee who teleworks, since that cost is determined by the rating area in which the employee resides, and a teleworker without an assigned office space may theoretically reside in any location, including a considerable distance from the employer’s headquarters or other main workplace. The more distant the residence of the teleworker, the more likely it is that the premiums for a lowest cost silver plan on the Exchange for the rating area where the employee resides will vary considerably from the employer’s headquarters (or other requested proxy). Therefore, the final regulations retain the proposed rule that, in the case of an employee who regularly works from home or at another worksite that is not on the employer’s premises but who may be required by his or her employer to work at, or report to, a particular worksite, such as a teleworker with an assigned office space, the worksite to which the employee would report to provide services if requested is the applicable primary site of employment, provided that the employee could reasonably be expected to report to that site on a daily basis, if required. The final regulations also retain the proposed requirement that, in the case of an employee who works remotely from home or at another worksite that is not on the employer’s premises and who otherwise does not have a particular assigned office space or a worksite to which to report, the employee’s residence is the primary site of employment.

The Treasury Department and the IRS note that, if an employer prefers not to use residence for an employee who works remotely from home or at another worksite that is not on the employer's premises, the employer may assign a location at which the employee may be required to work or report, even if the employer never requires the employee to do so. However, the assigned location must be a location at which the employee may reasonably be expected to report on a daily basis, if required. The Treasury Department and the IRS have added language to the final regulations to clarify this point and have added additional examples at §54.4980H-5(f)(6)(ii)(B)(1) regarding the application of these rules.

c. Employee Residence

Notwithstanding the location safe harbor, one commenter on the proposed regulations expressed an interest in using each employee's residence to determine affordability for purposes of section 4980H, stating that employee addresses are readily available to employers. Another commenter stated that there should be clear rules for employers that choose not to use the location safe harbor. As explained in the preamble to the proposed regulations, the use of the location safe harbor is optional for an employer, and if an employer opts not to use the location safe harbor, then the PTC affordability plan (that is, the lowest cost silver plan for the employee based on the employee's residence) would be used to determine the affordability of the offer of the individual coverage HRA.⁴¹ However, the Treasury Department and the IRS expect that most employers will choose to use the location safe harbor, in part because under the final integration regulations, an employer may offer and vary individual coverage HRAs for a class of employees whose primary site of employment is in the same rating area, but the final integration regulations

⁴¹ Note that, as discussed in part II(A)(4) of this preamble, although the safe harbors in the final regulations are optional, if an ALE chooses to use them, it must do so based on the classes of employees set forth in the final integration regulations.

do not provide for a class of employees based on the residences of employees.⁴² Thus, because the final integration regulations do not provide for a class of employees based on the location of employees' residences, an employer basing affordability on the residences of employees would need to use the most expensive lowest cost silver plan for self-only coverage available to any employee in the class, if the employer wants to ensure the offer is affordable to all employees in the class in order to avoid potential liability for an employer shared responsibility payment under section 4980H(b).

The proposed regulations did not provide any rules addressing the ability of an employer to identify the residence of the employee in the case of an employer who chooses to determine the affordability of the individual coverage HRA based on the residence of each employee instead of using the location safe harbor. However, the Treasury Department and the IRS requested comments on whether, in the case of an individual coverage HRA and for purposes of determining the location of the employee's residence, rules allowing the use of a snapshot date in a specified period prior to the beginning of the plan year, rules allowing a short delay in the application of any change in residence, or a rule similar to one of those alternatives would be helpful to employers, or whether the availability of the location safe harbor, in conjunction with the final integration regulations, generally eliminates the need for such rules. Similar to the location safe harbor, any residence safe harbor would need to include rules providing when a change in an employee's residence must be taken into account.

No comments regarding any residence safe harbor were received. However, the Treasury Department and the IRS clarify in the final regulations that an employer may rely on the

⁴² Section 54.9802-4(d)(2)(v).

residence information reported by an employee, unless the employer has knowledge that the residence information reported by an employee is incorrect.

d. Multiple Affordability Plans in One Rating Area

Although the final PTC regulations refer to the lowest cost silver plan offered through an Exchange for an employee in a rating area, there is not necessarily one lowest cost silver plan available to all individuals who reside in a rating area. Rather, the Centers for Medicare & Medicaid Services (CMS) has advised the Treasury Department and the IRS that, in some rating areas, there are different lowest cost silver plans in different parts of the rating area because some issuers offer coverage in only parts of rating areas (specifically, by county or zip code). For purposes of the PTC, whether an offer of an individual coverage HRA to an employee is affordable depends, in part, on the premium for the lowest cost silver plan available to that employee, which may differ from the lowest cost silver plan available to another employee residing in another part of the same rating area.

For the sake of clarity, as under the proposed regulations, the final regulations provide that the lowest cost silver plan for an employee for a month, for purposes of the safe harbors in the final regulations, is the lowest cost silver plan in the part of the rating area that includes the employee's applicable location. For purposes of this preamble and the final regulations, an employee's applicable location is either the employee's primary site of employment, if the employer uses the location safe harbor, or the employee's residence, if the employer chooses not to use the location safe harbor.

ALEs should be aware of how this rule interacts with the final integration regulations. Specifically, for an ALE with multiple worksites within a rating area that is using the location safe harbor, it may be the case that for some employees one lowest cost silver plan applies and

for other employees, with a primary site of employment in another part of the same rating area, a different lowest cost silver plan applies, perhaps with substantially different premiums.

Therefore, the amount the employer needs to make available under the individual coverage HRA, for purposes of avoiding potential liability for an employer shared responsibility payment under section 4980H(b), may vary by zip code or county, rather than by rating area. However, under the final integration regulations, employers may not create classes of employees based on a geographic area smaller than a rating area.⁴³ Accordingly, to the extent an ALE has multiple worksites in one rating area and is using the location safe harbor, the ALE will need to take these different rules into account in determining the amounts to be made available under an individual coverage HRA, and, in order to avoid potential liability for an employer shared responsibility payment under section 4980H(b), may need to base amounts made available in the HRA in a rating area on the most expensive lowest cost silver plan in any part of the rating area in which at least one employee has a primary site of employment.

2. Age-Related Issues

a. Consideration of Age-Based Safe Harbor

Under the final PTC regulations, for any given employee, the premium for the PTC affordability plan is based on the particular employee's relevant circumstances, including the particular employee's age. Consequently, even for employees residing in the same location (or working at the same location if the location safe harbor is applied), the cost of the applicable affordability plan is determined on an employee-by-employee basis.⁴⁴ In Notice 2018-88, the

⁴³ Section 54.9802-4(d)(2)(v).

⁴⁴ Also note that, under the final integration regulations, a plan sponsor of an individual coverage HRA may increase amounts made available under the HRA based on increases in the ages of participants in a class of employees subject to certain conditions. See §54.9804-2(c)(3). Nothing in the final regulations affects the rules allowing plan sponsors of individual coverage HRAs to vary amounts made available based on participants' ages. However, ALEs that offer individual coverage HRAs will need to take into account both the final integration regulations and section 4980H in designing an individual coverage HRA offered to full-time employees.

Treasury Department and the IRS acknowledged that determining the premium for the affordability plan for each employee based on his or her age might be burdensome for some employers, and requested comments on the administrative issues and burdens the age-based determination may raise and on safe harbors that would ease this burden and be consistent with the purpose and policies underlying section 4980H. One commenter on Notice 2018-88 favored an employee-by-employee age-based affordability determination asserting that employers will want to make HRA contributions based on employee ages. Therefore, the commenter did not see the need for an age-based safe harbor. However, several commenters on Notice 2018-88 stated that requiring the determination of affordability on an employee-by-employee basis, based on age, would be very burdensome for employers. These commenters requested an age-based safe harbor and indicated that the lack of such a safe harbor could discourage some larger employers from offering individual coverage HRAs, in particular for employers that want to provide a flat amount in the individual coverage HRA regardless of age. However, as explained in the preamble to the proposed regulations, the Treasury Department and the IRS did not include a safe harbor for the age used to determine the premium of an employee's affordability plan in the proposed regulations because of concerns that any age-based safe harbor would likely result in a number of employees (those with an age greater than the safe harbor age) being eligible for the PTC while the employer would not be subject to an employer shared responsibility payment under section 4980H(b) if the employee received the PTC.

Some commenters on the proposed regulations supported an employee-by-employee age-based affordability determination and, therefore, opposed an age-based safe harbor. One commenter noted that, if computing age-based premiums is burdensome for an employer, the employer could base the employee premium on the age of the oldest worker.

Some commenters requested an age-based safe harbor and provided various suggestions for how an age-based safe harbor could be designed. One commenter suggested basing affordability on a composite premium for an employer's employees or allowing employers to use the average age of all employees in each class of employees on the first day of the plan year. Some commenters suggested that an age-based safe harbor could be based on five to ten-year age bands. One commenter expressed concerns that the lack of an age-based safe harbor could lead to age discrimination in hiring since employers will know that the older the new hire, the more substantial the needed contribution.

The Treasury Department and the IRS acknowledge that determining the premium for the affordability plan for purposes of section 4980H for each full-time employee, based on age, may be burdensome for some employers. However, section 4980H incorporates the rules of section 36B for purposes of determining whether an ALE is subject to an employer shared responsibility payment under section 4980H(b), and it would be inappropriate for the Treasury Department and the IRS to provide safe harbors under section 4980H that deviate significantly from the section 36B rules. More specifically, as noted in part I(C)(2) of this preamble, the Treasury Department and the IRS have provided other section 4980H safe harbors, namely the HHI safe harbors, which have been designed to offer a reasonable proxy for information that the employer may not know or that could be burdensome to determine. By contrast, an employer typically knows the ages of its employees for a variety of unrelated purposes; consequently, it is not the case that employers do not know, or would bear a significant burden in determining, an employee's age. In addition, the average age of a group of employees generally will not be a reasonable proxy for a particular employee's age because, depending on the group, the average age may differ markedly from the ages of the older and younger members of the group.

Accordingly, as explained in the preamble to the proposed regulations, any age-based safe harbor would likely result in a number of employees (those with an age greater than the safe harbor age) being eligible for the PTC while the employer would not be subject to an employer shared responsibility payment under section 4980H(b) if the employee received the PTC, including in some cases by employer design. Finally, the Treasury Department and the IRS do not anticipate that the potential health costs associated with older employees would significantly increase the cost of offering an individual coverage HRA without an age-based safe harbor to a greater extent than those health costs associated with older employees would increase the cost of offering traditional group health plan coverage. Therefore, the Treasury Department and the IRS are of the view that the offer of an individual coverage HRA is not likely to have a significant impact on hiring decisions. Moreover, any unlawful age discrimination in hiring would violate the Age Discrimination in Employment Act and could be investigated by the Equal Employment Opportunity Commission.⁴⁵

For these reasons, consistent with the proposed regulations, the final regulations do not provide a safe harbor for the age used to determine the premium of an employee's affordability plan. Rather, under the final regulations as under section 36B, affordability of the offer of an individual coverage HRA for purposes of section 4980H is determined, in part, based on each employee's age.

As explained in the preamble to the proposed regulations, the Treasury Department and the IRS also note that, as a practical matter, if an employer wants to make a single amount available under an individual coverage HRA to a class of employees and ensure it avoids an employer shared responsibility payment under section 4980H(b), in general, the employer can

⁴⁵ See Public Law 90-202.

use the age of the oldest employee in the class of employees to determine the amount to make available under the HRA to that class of employees. However, if the employer does not make available under the HRA at least the full amount of the cost of the affordability plan, the employer will also need to compare each full-time employee's required contribution to the applicable amount under an HHI safe harbor to ensure the offer is affordable for all full-time employees. Further, the employer would need to take into account any geographic variation in the cost of the affordability plan (that is, the employer would need to ensure that it is basing affordability on the most expensive lowest cost silver plan available to any employee in the class, which may not be the lowest cost silver plan for the oldest employee in the class, as the lowest cost silver plan of a younger employee in the class in a different geographic location may have a higher cost).

b. Age Used to Determine Premium for Affordability Plan for an Employee

To provide clarity to employers, as under the proposed regulations, the final regulations specify the date as of which an employee's age is to be determined for a plan year for purposes of determining affordability under the section 4980H safe harbors.⁴⁶ Specifically, the final regulations provide that for an employee who is or will be eligible for an individual coverage HRA on the first day of the plan year, the employee's age for the plan year is the employee's age on the first day of the plan year, and for an employee who becomes eligible for an individual coverage HRA during the plan year, the employee's age for the remainder of the plan year is the

⁴⁶ The age identification rule in the final regulations does not apply for purposes of the final integration regulations, under which, in determining age with respect to a variation in amounts made available to participants based on age in an individual coverage HRA, plan sponsors may determine the age of the participant using any reasonable method for a plan year, so long as the plan sponsor determines each participant's age using the same method for all participants in the class of employees for the plan year and the method is determined prior to the plan year. See §54.9802-4(c)(3)(iii)(B). However, to the extent an ALE is offering an individual coverage HRA, the ALE will need to take into account both the final integration regulations and any rules under section 4980H; therefore, the Treasury Department and the IRS have provided a final rule under section 4980H that allows for compliance with both sets of rules.

employee's age on the date the HRA can first become effective for the employee. This rule is based on, but not an exact incorporation of, the age determination rule that applies for purposes of rate setting in the individual and small group markets, which is tied to the date of policy issuance or renewal.⁴⁷ As under the proposed regulations, the final regulations include a rule based on the HRA plan year and HRA effective date instead, to provide more certainty and simplicity for employers.

c. Age Band Used to Identify Affordability Plan for All Employees

The Treasury Department and the IRS understand that, in almost all cases, the plan that is the lowest cost silver plan at one age in a particular location will be the lowest cost silver plan for individuals of all ages in that location. However, CMS has advised the Treasury Department and the IRS that it is theoretically possible that, in some cases, one plan might be the lowest cost silver plan at one age and another plan might be the lowest cost silver plan at another age, in the same location. If that were to occur, however, the differences in premium amounts of the different plans at the same age would be extremely small (less than two dollars per month).

Therefore, in order to avoid the need for employers to determine different lowest cost silver plans in one location for employees of different ages, and to simplify the information that the Exchanges will make available to employers, as under the proposed regulations, the final regulations provide that for purposes of the safe harbors, the lowest cost silver plan for an employee for a month is the lowest cost silver plan for the lowest age band in the individual market for the employee's applicable location. For example, if an employer identifies the XYZ insurance company's plan as the lowest cost silver plan for an applicable location based on the XYZ plan's premium for the lowest age band, each employee's required contribution is based on

⁴⁷ See 45 CFR 147.102(a)(1)(iii).

the premium under the XYZ plan for the employee's age, even if the premium for a particular employee would be lower under another silver plan available at the location because the premium is lower for individuals in that particular age band under the other plan.

3. Look-back Month Safe Harbor

a. In General

Under the final PTC regulations, the affordability of an individual coverage HRA for a month is determined, in part, based on the cost of the PTC affordability plan for that month. For example, an employee's required contribution for January 2021 for an individual coverage HRA is based on the cost of the PTC affordability plan for January 2021. Further, Exchange plan premium information for a calendar year generally is not available until shortly before the beginning of the open enrollment period for that calendar year, which generally begins on November 1 of the prior calendar year.⁴⁸ In Notice 2018-88, the Treasury Department and the IRS noted that while this time frame is sufficient for individuals and Exchanges to determine potential PTC eligibility for the upcoming calendar year, the Treasury Department and the IRS are aware that employers generally determine the health benefits they will offer for an upcoming plan year (including the employees' required contributions) well in advance of the start of the plan year. Therefore, for an individual coverage HRA with a calendar-year plan year, employers generally would determine the benefits to offer, including the amount to make available in an HRA for the plan year, well before mid-to-late fall of the prior calendar year.

The Treasury Department and the IRS acknowledge that premiums in the individual market may vary from year to year and that a safe harbor based on prior year premium information would allow ALEs to determine affordability based on premiums that likely will

⁴⁸ See 45 CFR 155.410(e)(3).

differ from the actual current year premiums. However, ALEs designing health plans require timely access to the relevant information. Therefore, the proposed regulations included a safe harbor that allows employers to use prior year (or, in some cases, beginning of the year) premium information to determine affordability for purposes of section 4980H (the look-back month safe harbor). Specifically, for calendar year individual coverage HRAs, the look-back month safe harbor allows the employer to determine an employee's required contribution for any calendar month by using the monthly premium for the lowest cost silver plan for January of the prior calendar year. In the case of a non-calendar year individual coverage HRA, the look-back month safe harbor allows the employer to determine an employee's required contribution for any calendar month by using the monthly premium for the lowest cost silver plan for January of the current calendar year.

Commenting on the look-back month safe harbor in general, one commenter stated that premiums should be based on current year plan costs and that, to the extent these rates are announced later than employers would prefer, employers could calculate a reasonable approximation based on insurance company rate filings, which occur earlier in the year, and then adjust contributions as final rates become available. Another commenter requested that the proposed look-back month safe harbor be eliminated and suggested that employers use either current premium rates or an annual adjustment to prior premium information.

In addition, the Treasury Department and the IRS specifically requested comments on whether the proposed look-back month for non-calendar year individual coverage HRAs would be sufficient for individual coverage HRAs with plan years that begin relatively early in the calendar year and whether ALEs intend to offer individual coverage HRAs on a non-calendar year basis, including with plan years that begin early in the calendar year.

One commenter stated that, because the 90-day notice requirement in the final integration regulations limits an employer's ability to calculate affordability based on individual market prices, it is important that employers be allowed to use the prior year's premium in calculating affordability for calendar year plans and plans with start dates in the first quarter of the year. Another commenter suggested that plans with a start date in the first half of a calendar year should also be allowed to rely on the cost of plans in the previous year for the purposes of affordability.

The Treasury Department and the IRS note that the relevant premium information for non-calendar year individual coverage HRAs (that is, the premium for January of the current year) will be available by November 1 of the prior year, and, therefore, generally ALEs sponsoring non-calendar year individual coverage HRAs with plan years that begin early in the calendar year should have access to the necessary premium information sufficiently in advance of the start of the plan year.

As under the proposed regulations, the final regulations provide that an employer offering an individual coverage HRA with a calendar-year plan year may use the look-back month safe harbor, and in this case, the look-back month is January of the prior calendar year. The Treasury Department and the IRS are of the view that, in the absence of a look-back month safe harbor, it would be extremely burdensome for employers to calculate appropriate employee contribution levels for calendar-year plans. Moreover, as explained in more detail in part II(A)(3)(b) of this preamble, making mid-plan year adjustments to account for updated affordability plan information (or, for calendar year plans, making similar adjustments between November 1 and January 1) would be extremely burdensome for employers and would not provide commensurate benefits for employees. The Treasury Department and the IRS are therefore concerned that, in

the absence of a look-back month safe harbor, many employers will be functionally unable to offer an individual coverage HRA because it will be effectively impossible to determine the contributions required to avoid liability under section 4980H.

The final regulations also continue to take into account that even within a calendar year, from calendar month to calendar month, the lowest cost silver plan in an employee's applicable location may change due to plan termination or because the plan that was the lowest cost silver plan closes to enrollment (sometimes referred to as plan suppression). Therefore, as under the proposed regulations, to provide certainty to ALEs in these circumstances, the final regulations provide that under the look-back month safe harbor, in determining an employee's required contribution for any calendar month for purposes of section 4980H(b), an employer offering an individual coverage HRA with a calendar-year plan year may use the monthly premium for the lowest cost silver plan for January of the prior calendar year.

In addition, as under the proposed regulations, the final regulations provide that employers offering individual coverage HRAs with non-calendar year plan years (non-calendar year individual coverage HRAs) may also use the look-back month safe harbor, although in that case the look-back month is different. More specifically, for an employer offering a non-calendar year individual coverage HRA, as under the proposed regulations, the final regulations provide that under the look-back month safe harbor, in determining an employee's required contribution for a calendar month for purposes of section 4980H(b), an employer may use the monthly premium for the affordability plan for January of the current calendar year. This rule allows employers offering non-calendar year individual coverage HRAs to use the look-back month safe harbor in order to provide those employers timely access to the information they need to determine the coverage sufficient to avoid an employer shared responsibility payment, as

contemplated by section 4980H(b). The final regulations provide a different look-back month for employers offering non-calendar year individual coverage HRAs (that is, January of the current year) than those offering individual coverage HRAs with a calendar-year plan year (that is, January of the prior year) in order to strike the appropriate balance between employers having access to information sufficiently in advance of the plan year and avoiding the use of premium information that could be significantly out of date.

As under the proposed regulations, the final regulations provide that an ALE may use the look-back month safe harbor in addition to the other safe harbors included in the final regulations, and that an ALE may apply the look-back month safe harbor even if the ALE decides not to use the location safe harbor and, instead, bases the affordability plan for each employee on that employee's residence.

As under the proposed regulations, the final regulations also clarify that, although the look-back month safe harbor allows the employer to use premium information from the applicable look-back month to determine the cost of the affordability plan for each month of the current plan year, in determining the applicable premium, the employer must use the employee's applicable age for the current plan year and the employee's applicable location for the current month. In general, this means that the ALE may use the same premium (that is, the premium based on the applicable look-back month, applying current employee information) for each month of the plan year. However, to the extent the employee's applicable location changes during the plan year, although the ALE may continue to determine the monthly premium for the applicable lowest cost silver plan based on the applicable look-back month, the ALE must use the employee's new applicable location to determine that monthly premium. See parts II(A)(1)(b) and II(A)(2)(b) of this preamble for a discussion of the date as of which an

employee's age is determined for purposes of the section 4980H safe harbors and the date as of which an employee's primary site of employment is considered to have changed, for purposes of the location safe harbor.

Relatedly, Notice 2018-88 also included an anticipated safe harbor which allowed ALEs offering individual coverage HRAs to assume that the cost of the affordability plan for the first month of the plan year is the cost of the affordability plan for all months of the plan year (the non-calendar year safe harbor). This safe harbor was intended primarily to provide certainty with respect to non-calendar year individual coverage HRAs, for which the cost of the affordability plan would change mid-plan year (that is, upon the changing of the calendar year). However, the proposed regulations did not include this non-calendar year safe harbor because it is generally subsumed by the look-back month safe harbor. Specifically, under the final regulations, the look-back month safe harbor applies to non-calendar year individual coverage HRAs and provides a look-back month to determine the cost of the affordability plan for each month of the plan year. As a result, the look-back month safe harbor has addressed the issue underlying the non-calendar year safe harbor, and the Treasury Department and the IRS concluded that a separate non-calendar year safe harbor would be largely duplicative and confusing. Nonetheless, in the preamble to the proposed regulations, the Treasury Department and the IRS requested comments on whether any employers do not intend to use the look-back month safe harbor and would, therefore, need a separate safe harbor allowing the use of the premium for the first month of the current plan year to determine affordability for all months of the plan year.

One commenter on the proposed regulations stated that, to provide ALEs with maximum flexibility, ALEs should be allowed to use both the look-back month safe harbor and a separate safe harbor allowing the use of the premium for the first month of the current plan year to

determine affordability for all months of the plan year. However, the Treasury Department and the IRS continue to view a separate non-calendar year safe harbor as largely duplicative given the availability of the look-back month safe harbor. Therefore, the final regulations do not include a separate safe harbor allowing the use of the premium for the first month of the current plan year to determine affordability for all months of the plan year. Moreover, the Treasury Department and the IRS note that, to the extent an employee's applicable location changes during the plan year, although the ALE may continue to determine the monthly premium based on the applicable look-back month, the ALE must use the employee's new applicable location, in accordance with the rules set forth under §54.4980H-5(f)(6)(ii)(A), if applicable, to determine the monthly premium for the applicable lowest cost silver plan based on the applicable look-back month.

b. Adjustment to Look-back Month Premium Amounts

The preamble to the proposed regulations noted that the Treasury Department and the IRS considered whether to apply an adjustment to the cost of the affordability plan under the look-back month safe harbor to approximate the increase or decrease in premiums from the applicable month used for the look-back month safe harbor to the first month of the plan year, but did not propose such an adjustment to avoid complexity and due to uncertainty regarding how to determine an appropriate adjustment in all circumstances and for all years.

Some commenters on the proposed regulations stated that the final regulations should not include an annual adjustment for premiums of the lower-cost silver plan from one year to the next for the purpose of determining affordability of the individual coverage HRA. As noted in part II(A)(3)(a) of this preamble, other commenters opposed the look-back month safe harbor and suggested that mid-year adjustments be allowed instead. One commenter did not support

applying an adjustment to the look-back month safe harbor but requested the use of a standardized and readily ascertainable adjustment, if an adjustment requirement is included in the final regulations.

The Treasury Department and the IRS have considered these comments and continue to be concerned about the complexity and burdens that would be imposed by the application of an adjustment to the prior premiums under the look-back month safe harbor and agree with commenters regarding the difficulty of producing an accurate adjustment. In particular, the Treasury Department and the IRS are concerned about the ability to produce a sufficiently accurate adjustment due to geographic variation in premiums (including geographic variations in the relative annual increases or decreases in premiums) and that the timing of access to premium information would hamper the ability to apply an adjustment that is based on truly up-to-date information. The Treasury Department and the IRS also considered applying more general adjustments (such as one based on the Consumer Price Index overall medical care component or PPACA's premium adjustment percentage⁴⁹) but are concerned that those adjustments would add complexity to the safe harbor while not reflecting premium changes in a way that is sufficiently specific to an employer's employees, including their applicable locations. Therefore, consistent with the proposed regulations, the final regulations do not include an adjustment to the prior premium information as part of the look-back month safe harbor.

4. Consistency Requirement and Conditions for the Safe Harbors

Under the proposed regulations, use of any of the safe harbors was optional for an ALE. However, rather than providing that a consistency requirement applies based on reasonable

⁴⁹ See PPACA section 1302(c)(4).

categories of employees as set forth in §54.4980H-5(e)(2)(i),⁵⁰ the proposed regulations provided that an ALE could choose to apply the safe harbors for any class of employees as defined in the final integration regulations,⁵¹ provided the ALE does so on a uniform and consistent basis for all employees in the class. The proposed regulations based the consistency requirement for the safe harbors on the classes of employees in the final integration regulations for the sake of consistency with those regulations and to reduce complexity for employers in complying with both sets of regulations.

One commenter on the proposed regulations requested confirmation that, for purposes of the consistency requirement, employers would be permitted to use any subclasses permitted under the individual coverage HRA final regulations, including under §54.9802-4(d)(2)(xi), which relates to combinations of classes of employees. The final regulations retain the proposed rule. Any of the subclasses permitted under the final integration regulations may be used for purposes of the consistency requirement.

In addition, as under the proposed regulations, the final regulations clarify the conditions for using the safe harbors in the final regulations, including the HHI safe harbors as applied to offers of individual coverage HRAs. Current regulations under section 4980H provide that an ALE may use an HHI safe harbor only if the ALE offers its full-time employees (and their dependents) eligible employer-sponsored coverage that provides MV with respect to the self-only coverage offered to the employee. Because an individual coverage HRA is deemed to provide MV by virtue of being affordable (and there is no independent determination of MV as

⁵⁰ Under §54.4980H-5(e)(2)(i), reasonable categories generally include specified job categories, the nature of compensation (hourly or salary), geographic location, and similar bona fide business criteria.

⁵¹ Section 54.9802-4(d)(2). The final regulations refer to the definition of classes of employees in the final integration regulations but do not incorporate the definitions or include the requirements from other related rules, such as the minimum class size requirement set forth in §54.9802-4(d)(3).

for other types of employer-sponsored coverage), under the final regulations, satisfying the MV requirement is not a specific condition of the HHI safe harbors as applied to individual coverage HRAs.

5. Application of Current HHI Safe Harbors to Individual Coverage HRAs

As described in part I(B) of this preamble, under section 36B, whether an offer of coverage under an eligible employer-sponsored plan is affordable is based on whether the employee's required contribution exceeds the required contribution percentage of the employee's household income. Because an ALE generally will not know an employee's household income, the current section 4980H regulations set forth three HHI safe harbors under which an employer may base the employee's required contribution on information that is readily available to the employer, rather than on actual household income.⁵²

As with other types of employer-sponsored coverage, employers that offer individual coverage HRAs will not know employees' household incomes. Therefore, the proposed regulations provided that an employer offering an individual coverage HRA to a class of employees may use the HHI safe harbors in determining whether the offer of the HRA is affordable for purposes of section 4980H(b). The Treasury Department and the IRS did not receive any comments on this aspect of the proposed regulations, and the final regulations adopt this provision as proposed.

As under the proposed regulations, the final regulations clarify how the HHI safe harbors apply to an offer of an individual coverage HRA. Specifically, the current HHI safe harbors assume that the employee's required contribution will be based on the lowest cost self-only coverage that provides MV that the employer offers to the employee. As under the proposed

⁵² See §54.4980H-5(e)(2).

regulations, the final regulations clarify that, in applying the HHI safe harbors to an offer of an individual coverage HRA, the employee's required HRA contribution is to be used, taking into account any other applicable safe harbors under the final regulations.

Further, as under the proposed regulations, the final regulations include technical updates to the current HHI safe harbors to reflect that the percentage used to determine affordability is the required contribution percentage (rather than a static 9.5 percent), which is adjusted in accordance with section 36B(c)(2)(C)(iv) and the regulations thereunder. The Treasury Department and the IRS clarified this issue in Notice 2015-87 and now have the opportunity to reflect that clarification in the regulation text.⁵³ The final regulations do not make substantive changes to the current HHI safe harbors as applied to employer-sponsored coverage that is not an individual coverage HRA.⁵⁴

6. Minimum Value

As described in part I(B) of this preamble, in general, under section 36B, an eligible employer-sponsored plan provides MV if the plan's share of the total allowed costs of benefits provided under the plan is at least 60 percent of the costs and if the plan provides substantial coverage of inpatient hospitalization and physician services.⁵⁵ Because of the differences between individual coverage HRAs and traditional group health plans, the final PTC regulations provide that an individual coverage HRA that is affordable is treated as providing MV.⁵⁶

⁵³ See Notice 2015-87, 2015-52 IRB 889, Q&A 12. In Notice 2015-87, the Treasury Department and the IRS clarified a number of issues related to section 4980H. The final regulations do not affect the guidance provided in that notice, which remains in effect. See also 81 FR 91755, 91758 (Dec. 19, 2016).

⁵⁴ The final regulations also provide technical updates to §54.4980H-4(b), regarding mandatory offers of coverage, where the use of 9.5 percent needed to be updated to refer instead to the required contribution percentage. The updates incorporate the clarification provided in Notice 2015-87, Q&A 12 and are not substantive changes.

⁵⁵ See section 36B(c)(2)(C)(ii); see also 80 FR 52678 (Sept. 1, 2015).

⁵⁶ See §1.36B-2(c)(3)(i)(B).

Notice 2018-88 and the proposed regulations explained that the MV definition under the proposed PTC regulations would apply for purposes of determining whether an ALE that offers an individual coverage HRA has made an offer that provides MV for purposes of section 4980H. Therefore, an individual coverage HRA that is affordable under the final PTC regulations would be treated as providing MV for purposes of section 4980H.

Commenters on the proposed regulations supported the proposed rule that an individual coverage HRA that is affordable is deemed to provide MV. However, some commenters suggested the use of a different metal level plan in determining affordability and MV for individual coverage HRAs more generally, such as the highest cost bronze plan or the less expensive of the lowest cost silver plan or the median cost bronze plan. In addition, one commenter requested that the final regulations specify that the lowest cost silver plan can be individual health insurance coverage that is not offered through an Exchange (referred to as “an off-Exchange plan”), as premiums tend to be less expensive off the Exchange than on the Exchange.

The Treasury Department and the IRS considered the use of a different metal level plan in connection with the final PTC regulations and addressed comments on this topic in the preamble to the final PTC regulations.⁵⁷ Further, section 4980H applies the MV standard by reference to section 36B, and commenters provided no legal basis for applying a different standard under section 4980H. Therefore, consistent with the proposed regulations, under the final regulations, an individual coverage HRA that is affordable (as determined under the applicable section 36B rules, in combination with any applicable section 4980H safe harbors), is deemed to provide MV.

⁵⁷ See 84 FR 28888, 28943-28946 (June 20, 2019).

The Treasury Department and the IRS note that, in providing rules for implementing the statute, the IRS generally may provide safe harbors to provide administrative simplicity and certainty for taxpayers. These safe harbors are not formulated as a means to circumvent or reduce the substantive requirements of the statute, but rather allow the substitution of information that is more accessible and easier to obtain in circumstances in which the substitute information acts as a reasonable proxy for, and does not facilitate the avoidance of, statutory requirements. For example, in the case of the Form W-2 safe harbor, an employee's income as reported on the Form W-2 is accessible to the employer, although the statutory standard of household income generally is not. At the same time, the income from the Form W-2 is a suitable proxy for household income because the income from the Form W-2 rarely will be greater than an employee's household income.

With respect to the appropriate plan premium to reference to determine affordability for purposes of section 4980H, the Treasury Department and the IRS note that under the applicable section 36B rules governing eligibility for a PTC, whether an offer of an individual coverage HRA is affordable (and, thus, deemed to provide MV), is determined by the premium of the applicable lowest cost silver plan (that is, the lowest cost silver plan on the Exchange based on the residence of an individual). The premium cost of the lowest cost silver plan is not the type of information that is inaccessible or burdensome to obtain such that a safe harbor providing a proxy is needed. Moreover, section 4980H imposes the employer shared responsibility payment based on whether an employee is allowed a PTC. Thus, any safe harbor for determining affordability under section 4980H must be based on a suitable proxy for the section 36B standard. Although a bronze plan or an off-Exchange silver plan generally has an actuarial value of at least 60 percent and is otherwise considered to provide MV, the lowest cost silver plan

available on the Exchange to the employee is used to determine whether an offer of an individual coverage HRA is affordable and, thus, prevents a full-time employee from being allowed a PTC for his or her individual health insurance coverage through an Exchange. With respect to the determination of affordability regarding an offer of coverage to an employee, it is the premium for that particular identified plan that is relevant, and not the premium for other plans with similar actuarial values. In addition, the premium for a bronze plan or an off-Exchange silver plan may be lower than the standard under the section 36B regulation.

Finally, an individual coverage HRA that is treated as affordable for an individual for purposes of section 4980H based on those lower premiums will result in an offer that will be uniformly unaffordable to the individual based on the regulations under section 36B. Thus, in many cases this suggested safe harbor would result in most, if not all, lower income employees receiving the PTC while the employer would have no liability for the employer shared responsibility payment. For these reasons, the suggestion to permit affordability for section 4980H purposes to be determined based on the premium for a bronze plan or an off-Exchange silver plan is not adopted in the final regulations.

7. Reporting under Sections 6055 and 6056

a. Section 6056

Section 6056 requires ALEs to file with the IRS and furnish to full-time employees information about whether the employer offers coverage to full-time employees and, if so, information about the coverage offered. An ALE that offers an individual coverage HRA to its full-time employees, just like all ALEs, is required to satisfy the section 6056 reporting requirements. ALEs use Form 1094-C, “Transmittal of Employer-Provided Health Insurance

Offer and Coverage Information Returns,” and Form 1095-C, “Employer-Provided Health Insurance Offer and Coverage,” to satisfy the section 6056 reporting requirements.

Section 6056 and Form 1095-C require ALEs to report each full-time employee’s required contribution.⁵⁸ Notice 2018-88 discussed possible approaches that guidance might take with respect to reporting that information, and the proposed regulations included no amendments regarding the regulations under section 6056. Instead, the Treasury Department and the IRS proposed providing guidance in forms and instructions.

Several commenters on the proposed regulations requested that minimal changes be made to Forms 1094-C and 1095-C, while one commenter suggested that Form 1095-C should be eliminated. Commenters also requested that reporting instructions be released as soon as possible.

Consistent with the proposed regulations, the final regulations do not amend the regulations under section 6056 and do not address comments related to the regulations under section 6056, which are beyond the scope of the final regulations. Guidance regarding reporting in connection with individual coverage HRAs is provided in forms and instructions. The 2020 Form 1095-C and related instructions permit the reporting of the employee’s required contribution based on the section 4980H safe harbor(s) used by the ALE, as an alternative to the employee’s required contribution determined under the final PTC regulations without application of the relevant safe harbors. The 2020 Form 1095-C also includes revised codes to account for the new individual coverage HRA safe harbors. The Treasury Department and the IRS note that, while the 2020 Form 1095-C requests an employee’s age as of January 1, 2020, for purposes of administrative simplicity, the related instructions clarify that, for non-calendar year plans or for

⁵⁸ See also §301.6056-1(d)(1)(vi).

employees who become eligible during the plan year, this age may not be the applicable age used to determine the employee's required contribution based on the final regulations.

b. Section 6055

Section 6055 provides that all persons who provide MEC to an individual must report certain information to the IRS that identifies covered individuals and the period of coverage, and that these persons must furnish a statement to covered individuals including the same information. Information returns under section 6055 generally are filed using Form 1095-B, "Health Coverage." However, self-insured ALEs are required to file Form 1095-C and use part III of that form, rather than Form 1095-B, to report information required under section 6055.

Individual coverage HRAs are group health plans and, therefore, are eligible employer-sponsored plans that are MEC. Accordingly, reporting under section 6055 is required for individual coverage HRAs. In general, the employer is the entity responsible for this reporting.⁵⁹ The Treasury Department and the IRS note that there are regulations under §1.6055-1(d) that provide exceptions for certain plans from the section 6055 reporting requirements.⁶⁰ These regulations include exceptions for certain duplicative coverage or supplemental coverage providing MEC. More specifically, the regulations provide that: (1) if an individual is covered by more than one MEC plan or program provided by the same reporting entity, reporting is required for only one of the plans or programs; and (2) reporting is not required for an individual's MEC to the extent that the individual is eligible for that coverage only if the individual is also covered by other MEC for which section 6055 reporting is required, but for eligible employer-sponsored coverage this exception applies only if the supplemental coverage is offered by the same

⁵⁹ Section 1.6055-1(c)(2).

⁶⁰ See §1.6055-1(d)(2). See also Prop. Reg. §1.6055-1(d)(2) and (3), in 81 FR 50671 (Aug. 2, 2016) (these regulations may be relied upon for calendar years ending after December 31, 2013) and Notice 2015-68, 2015-41 IRB 547.

employer that offers the eligible employer-sponsored coverage for which section 6055 reporting is required.⁶¹ Although an individual enrolled in an individual coverage HRA is required to be enrolled in individual health insurance coverage, Medicare Part A and B, or Medicare Part C, which are other forms of MEC, the employer providing the individual coverage HRA generally is not the same entity that provides the individual health insurance coverage. Accordingly, these section 6055 exceptions generally do not apply to individual coverage HRAs.

Some commenters on the proposed regulations requested that section 6055 reporting requirements not apply to employers with respect to coverage provided under individual coverage HRAs or to self-funded employers generally because of the administrative burdens these reporting requirements would place on employers. Some commenters recommended that any further guidance regarding individual coverage HRAs and sections 6055 and 6056 provide employers and issuers with transitional compliance relief.

Consistent with the proposed regulations, the final regulations do not amend the regulations under section 6055, as the Treasury Department and the IRS are of the view that potential burdens imposed by the reporting requirements under section 6055 regarding individual coverage HRAs are not significantly different from those applicable to employers that sponsor traditional group health plans. However, the Treasury Department and the IRS note that because the individual shared responsibility payment under section 5000A was reduced to zero for months beginning after December 31, 2018, Notice 2018-94, 2018-51 IRB 1042 and Notice 2019-63, 2019-51 IRB 1390 stated that the Treasury Department and the IRS were studying whether and how the reporting requirements under section 6055 should change, if at all,

⁶¹ Prop. Reg. §1.6055-1(d)(2) and (3). Id.

for future years. See Notice 2020-76, 2020-47 IRB 1058 for certain transition relief regarding the 2020 information-reporting requirement under section 6055.

8. Application of Tobacco Surcharge and Wellness Incentives to Affordability Determinations

One commenter on Notice 2018-88 noted that whether an individual is a tobacco user can have an impact on premiums for individual health insurance coverage. This commenter requested that the Treasury Department and the IRS permit employers to use the non-tobacco rate in determining affordability for purposes of the PTC and section 4980H.

In response, and consistent with current related guidance,⁶² the final PTC regulations provide that for purposes of determining the premium for the lowest cost silver plan used to determine the employee's required HRA contribution: (1) if the premium differs for tobacco users and non-tobacco users, the premium taken into account is the premium that applies to non-tobacco users; and (2) the premium is determined without regard to any wellness program incentive that affects premiums unless the wellness program incentive relates exclusively to tobacco use, in which case the incentive is treated as earned.⁶³ Consistent with the proposed regulations, the final regulations incorporate these rules by reference for purposes of determining the affordability plan and the associated premium.

9. Implementation of Section 4980H Safe Harbors and Reliance on Exchange Information

The Treasury Department and the IRS recognize that access to location-specific lowest cost silver plan premium data, on a month-by-month basis, which is preserved and includes prior year information, is necessary for employers to use the safe harbors included in the proposed

⁶² See §§1.36B-2(c)(3)(v)(A)(4) and 1.36B-3(e).

⁶³ Section 1.36B-2(c)(5)(iii)(A). See 84 FR 28888, 28496-28497 (June 20, 2019).

regulations. One commenter on the proposed regulations requested that HHS make lowest cost silver plan information available as soon as possible, and another commenter expressed concerns that sufficient information would not be available early enough for ALEs in many states that do not use the Federal HealthCare.gov platform (State Exchanges).

Lowest cost silver plan data is now available from HHS for employers in all states that use the Federal HealthCare.gov platform to determine whether the individual coverage HRA offer is affordable for purposes of section 4980H.⁶⁴ Regarding State Exchanges, HHS has begun considering the information it will make available in order to help the State Exchanges prepare to make this information available.

One commenter also requested a simple, nationwide online lowest cost silver plan calculator that does not require a data download. As noted earlier in this section, HHS has made information available for the Exchanges that use the Federal HealthCare.gov platform.

Further, the Treasury Department and the IRS recognize that employers are not in a position to verify whether the lowest cost silver plan premium information posted by an Exchange for this purpose has been properly computed and identified, and, therefore, employers will need to be able to rely on the premium information that Exchanges make available. Accordingly, as under the proposed regulations, the final regulations provide that ALEs may rely on the lowest cost silver plan premium information made available by an Exchange for purposes of determining affordability under section 4980H. Employers should retain relevant records.⁶⁵

10. Other Comments Related to Section 4980H

⁶⁴ See <https://www.healthcare.gov/small-businesses/learn-more/individual-coverage-hra/>.

⁶⁵ The regulations under section 4980H do not include specific recordkeeping requirements, so the otherwise generally applicable substantiation and recordkeeping requirements in section 6001 apply.

One commenter on Notice 2018-88 requested clarification that the offer of an individual coverage HRA is an offer of coverage for purposes of section 4980H, even if the individual offered the individual coverage HRA does not take the HRA or enroll in individual health insurance coverage. To avoid an employer shared responsibility payment, section 4980H requires an ALE to offer its full-time employees (and their dependents) an opportunity to enroll in an eligible employer-sponsored plan. Section 4980H does not require that the full-time employees (or their dependents) actually enroll, in order for the employer to avoid an employer shared responsibility payment. Moreover, as group health plans, individual coverage HRAs are eligible employer-sponsored plans. Therefore, the Treasury Department and the IRS confirm, for the sake of clarity, that the offer of an individual coverage HRA is an offer of an eligible employer-sponsored plan for purposes of section 4980H, without regard to whether the employee accepts the offer. As under the proposed regulations, the final regulations do not affect existing guidance with respect to this issue.

One commenter on Notice 2018-88 requested clarification that, for purposes of section 4980H, an employer that offers an individual coverage HRA will be treated as offering the HRA to Medicare-enrolled and Medicare-eligible employees, even if those employees are unable to obtain individual health insurance coverage on account of their Medicare status. Under section 4980H and the regulations thereunder, in general, an employer is considered to offer coverage to an employee if the employee has an effective opportunity to elect to enroll in coverage at least once with respect to the plan year.⁶⁶ Whether an employee has an effective opportunity to enroll is determined based on all the relevant facts and circumstances. Further,

⁶⁶ See §54.4980H-4(b)(1). The regulations also provide guidance on the circumstances in which an employer is considered to have made an offer of coverage even if the employee does not have an effective opportunity to decline to enroll in the coverage.

under the final integration regulations, an individual coverage HRA may be integrated with Medicare Parts A and B or Medicare Part C; therefore, an employee enrolled in Medicare may enroll in the HRA, even though the employee may not be able to obtain individual health insurance coverage due to his or her status as a Medicare enrollee.⁶⁷ Thus, the offer of an individual coverage HRA to an employee who is enrolled in Medicare provides the employee an effective opportunity to enroll in the HRA and constitutes an offer of coverage to the employee for purposes of section 4980H. As a result, the offer is taken into account in determining if the ALE offered coverage to a sufficient percentage or number of full-time employees (and their dependents) for purposes of avoiding an employer shared responsibility payment under section 4980H(a). In addition, because an individual enrolled in Medicare is not eligible for the PTC for his or her individual health insurance coverage through an Exchange⁶⁸ and an ALE will only be liable for an employer shared responsibility payment for a month with respect to a full-time employee under section 4980H(b) if the full-time employee is allowed the PTC for that month, an ALE will not be liable for an employer shared responsibility payment under section 4980H(b) for a month with respect to a full-time employee enrolled in Medicare for that month.⁶⁹

Some commenters on Notice 2018-88 inquired about the interaction between section 4980H and an offer of an excepted benefit HRA,⁷⁰ including the consequences to an ALE if the excepted benefit HRA is used to purchase short-term, limited-duration insurance (STLDI). Among other requirements, in order for an ALE to avoid an employer shared responsibility

⁶⁷ See 84 FR 28888 (June 20, 2019), 28928-28931.

⁶⁸ See section 36B(c)(2)(B) and §1.36B-2(a)(2).

⁶⁹ The rules under section 4980H for employees eligible for, but not enrolled in, Medicare apply as they do for non-Medicare-eligible employees. However, note that an individual who is eligible for Medicare generally is ineligible for the PTC. See *id.*

⁷⁰ See §54.9831-1(c)(3)(viii).

payment, it must offer an eligible employer-sponsored plan that is MEC to its full-time employees (and their dependents). Although group health plans generally are eligible employer-sponsored plans that are MEC, excepted benefits are not MEC.⁷¹ Consequently, the offer of an excepted benefit HRA is not an offer of an eligible employer-sponsored plan that is MEC for purposes of section 4980H, regardless of whether the excepted benefit HRA is used, or may be used, to purchase STLDI.

However, in order for an HRA to be an excepted benefit HRA, the employer must offer the employees who are offered the excepted benefit HRA other group health plan coverage that is not limited to excepted benefits and that is not an HRA or other account-based group health plan.⁷² Because the other group health coverage may not be limited to excepted benefits, that offer of other coverage is an offer of an eligible employer-sponsored plan that is MEC for purposes of section 4980H. Whether the offer of coverage under the other group health plan in connection with the excepted benefit HRA is an affordable, MV offer depends on the particular characteristics of the group health plan and the coverage offered under that plan. As under the proposed regulations, the final regulations do not affect existing guidance with respect to this issue.

B. Final Regulations under Section 105(h)

Under the final integration regulations, employers may limit the offer of an individual coverage HRA to certain classes of employees and may vary the amounts, terms, and conditions of individual coverage HRAs among the different classes of employees.⁷³ But within any class of employees offered an individual coverage HRA, the employer must offer the HRA on the same

⁷¹ See section 5000A(f)(3).

⁷² See §54.9831-1(c)(3)(viii)(A).

⁷³ See §54.9802-4(d).

terms and conditions to all employees in the class, subject to certain exceptions (the same terms requirement).⁷⁴ One of the exceptions to the same terms requirement is that the employer may increase the maximum dollar amounts made available under an individual coverage HRA as the age of the participant increases provided that (1) the same maximum dollar amount attributable to the increase in age is made available to all participants in a class of employees who are the same age, and (2) the maximum dollar amount made available to the oldest participant(s) is not more than three times the maximum dollar amount made available to the youngest participant(s).⁷⁵ Other exceptions to the same terms requirement include rules allowing the employer to prorate amounts made available for employees and dependents who enroll in the HRA after the beginning of the HRA plan year, to make available carryover amounts, and for employees with amounts remaining in other HRAs, to make available those remaining amounts in the current individual coverage HRA. Each of these exceptions is subject to the conditions set forth in the final integration regulations.⁷⁶

As explained in part I(D) of this preamble, HRAs, including individual coverage HRAs, generally are subject to section 105(h) and the regulations thereunder.⁷⁷ Further, the regulations under section 105(h) provide that “any maximum limit attributable to employer contributions must be uniform for all participants and for all dependents of employees who are participants and may not be modified by reason of a participant’s age or years of service.”⁷⁸ In Notice 2018-88

⁷⁴ See §54.9802-4(c)(3).

⁷⁵ Section 54.9802-4(c)(3)(iii)(B). The proposed integration regulations included the same terms requirement, including the exception for age variation, but did not include the limit on the extent to which amounts made available may be increased based on age, which was added to the final integration regulations in response to comments. See 84 FR 28888, 28904-28907 (June 20, 2019).

⁷⁶ Section 54.9802-4(c)(3)(ii) and (v).

⁷⁷ As noted in part I(d) of this preamble, an HRA that, by its terms, only reimburses premiums for individual health insurance coverage is not subject to section 105(h) (see §1.105-11(b)(2)). Further, section 105(h) and the regulations thereunder, including the final regulations, are only relevant to an individual coverage HRA offered to one or more HCIs and are not relevant for an individual coverage HRA that is not offered to any HCI.

⁷⁸ See §1.105-11(c)(3)(i).

and in the preamble to the proposed regulations, the Treasury Department and the IRS explained that varying the maximum amounts made available under an individual coverage HRA for different classes of employees would conflict with the requirement in §1.105-11(c)(3)(i) that any maximum limit attributable to employer contributions must be uniform for all participants and that, without further guidance, certain amounts paid to an HCI under an individual coverage HRA that implements an age-based increase would be includible in the income of the HCI because the HRA would fail to satisfy the requirement in §1.105-11(c)(3)(i) that prohibits the maximum limit attributable to employer contributions to the HRA from being modified by reason of a participant's age.

In light of the final integration regulations, and for the reasons described in Notice 2018-88, the preamble to the proposed regulations, and earlier in this section of this preamble, safe harbors continue to be needed under the section 105(h) regulations to facilitate the offering of individual coverage HRAs. The proposed regulations provided that an individual coverage HRA that satisfies the age variation exception under the same terms requirement at §54.9802-4(c)(3)(iii)(B) will not be treated as failing to satisfy the requirements to provide nondiscriminatory benefits under §1.105-11(c)(3)(i) solely due to the variation based on age. More generally, the proposed regulations also provided that if the maximum dollar amount made available varies for participants within a class of employees, or varies between classes of employees, then with respect to that variance, the individual coverage HRA does not violate the requirement in §1.105-11(c)(3)(i) that any maximum limit attributable to employer contributions must be uniform for all participants, if within each class of employees, the maximum dollar amount varies only in accordance with the same terms requirement and, with respect to

differences in the maximum dollar amount made available for different classes of employees, the classes of employees are classes of employees set forth in §54.9802-4(d).

No commenters opposed the proposed safe harbor under section 105(h). One commenter raised concerns that, even with the proposed safe harbor under section 105(h), compliance with section 105(h) will be an administrative burden for employers, particularly small employers. The general compliance requirements imposed by section 105(h) are unaffected by the final regulations, however, and further regulatory changes regarding section 105(h) are outside the scope of this rulemaking.

The final regulations therefore retain the proposed safe harbor under section 105(h). Nonetheless, the Treasury Department and the IRS note that satisfying the terms of the safe harbors under the final regulations does not automatically satisfy the prohibition on nondiscriminatory operation under §1.105-11(c)(3)(ii). Thus, among other situations, if a disproportionate number of HCIs qualify for and utilize the maximum HRA amount allowed under the same terms requirement based on age in comparison to the number of non-HCIs who qualify for and use lower HRA amounts based on age, the individual coverage HRA may be found to be discriminatory, with the result that excess reimbursements of the HCIs will be included in their income.⁷⁹

C. Application of Section 125 Cafeteria Plan Rules to Arrangements Involving Individual Coverage HRAs

The preambles to both the proposed and final HRA integration regulations noted that some employers may want to allow employees to pay the portion of the premium for individual health insurance coverage that is not covered by an individual coverage HRA, if any, through a

⁷⁹ See §1.105-11(c)(3).

salary reduction arrangement under a section 125 cafeteria plan. Pursuant to section 125(f)(3), an employer generally may not provide a qualified health plan purchased through an Exchange as a benefit under its cafeteria plan. Therefore, an employer may not permit employees to make salary reduction contributions to a cafeteria plan to purchase a qualified health plan (including individual health insurance coverage) offered through an Exchange. However, section 125(f)(3) does not apply to an off-Exchange plan including a qualified health plan offered outside of an Exchange. Therefore, for an employee who purchases individual health insurance coverage outside of an Exchange, the employer may permit the employee to pay the balance of the premium for the coverage through its cafeteria plan.

In response to the proposed integration regulations, some commenters requested that individuals be allowed to use a cafeteria plan to pay premiums for qualified health plans offered through an Exchange with salary reduction. As discussed in the preceding paragraph, section 125(f)(3) prohibits using a cafeteria plan to allow employees to pay premiums for a qualified health plan offered through an Exchange.

In light of the comments regarding the integration regulations, the Treasury Department and the IRS in the preamble to the proposed regulations requested additional comments regarding any specific issues raised by the application of the section 125 cafeteria plan rules to arrangements involving individual coverage HRAs for which clarification is needed or for which a modification of the applicable rules may decrease burdens.

One commenter stated that the current cafeteria plan rules may need to be modified to address how nondiscrimination testing and penalties will interact with the potential reimbursement of individual coverage options and that guidance should address the documentation of individual coverage HRAs in section 125 plan documents. While this comment

is outside the scope of the final regulations, which solely amend the regulations under sections 4980H and 105(h), the Treasury Department and the IRS will take this comment into consideration for future guidance regarding the application of section 125.

D. Other Comments

A number of commenters on the proposed regulations proposed changes relating to the final integration regulations. These comments included changing the rules in the final integration regulations with respect to classes of employees, contribution amounts within classes, the 3:1 age ratio, limiting individual coverage HRA reimbursements to coverage subject to the qualified health plan requirements with a metal level actuarial value designation of bronze, silver, gold, or platinum, and the language in notices to employees. All of these suggestions would require amending the final integration regulations and, thus, are outside the scope of the final regulations, which solely amend the regulations under sections 4980H and 105(h). With respect to comments regarding the language in notices to employees, the Treasury Department and the IRS note that employers using the model notice issued in connection with the final integration regulations may choose to include additional information in the notice if that information is necessary or helpful to interested persons in understanding the information in the model notice. However, the notice should not have the effect of misleading or misinforming recipients or of deemphasizing the information required to be included in the notice under the final integration regulations.

Effective/Applicability Date

The regulations contained in the document are effective on **[INSERT DATE OF FILING IN THE FEDERAL REGISTER]**. The amendments to the regulations under section 4980H apply for periods beginning after December 31, 2019, and the amendments to the

regulations under section 105(h) apply to plan years beginning after December 31, 2019. As explained in the preamble to the proposed regulations, taxpayers are permitted to rely on the proposed regulations under section 4980H for periods during any plan year of individual coverage HRAs beginning before the date that is six months following the publication of the final regulations, and taxpayers are permitted to rely on the proposed regulations under section 105(h) for plan years of individual coverage HRAs beginning before the date that is six months following the publication of the final regulations.

Special Analyses

The regulations are not subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Treasury Department and the Office of Management and Budget regarding review of tax regulations. Because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f), the notice of proposed rulemaking preceding the regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business, and no comments were received.

Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any 1 year by state, local, or Tribal governments, in the aggregate, or by the private sector, of \$100 million in 1995 dollars, updated annually for inflation. In 2020, that threshold is approximately \$156 million.

The final regulations do not include any Federal mandate that may result in expenditures by state, local, or tribal governments, or by the private sector in excess of that threshold.

Executive Order 13132: Federalism

Executive Order 13132 (entitled “Federalism”) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on state and local governments, and is not required by statute, or preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This final rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

Statutory Authority

The regulations are adopted pursuant to the authority contained in sections 7805 and 9833.

Drafting Information

The principal author of the regulations is Jennifer Solomon of the Office of Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes). However, other personnel from the Treasury Department and the IRS participated in the development of the regulations.

Statement of Availability of IRS Documents

The notices cited in this document are published in the Internal Revenue Bulletin (or Cumulative Bulletin) and are available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at <http://www.irs.gov>.

List of Subjects

26 CFR Part 1

Income Taxes, Reporting and recordkeeping requirements.

26 CFR Part 54

Excise taxes, Health care, Health insurance, Pensions, Reporting and recordkeeping requirements.

Amendments to the Regulations

Accordingly, 26 CFR parts 1 and 54 are amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.105-11 is amended by revising paragraphs (c)(3)(i) and (j) to read as follows:

§1.105-11 Self-insured medical reimbursement plan.

* * * * *

(c) * * *

(3) ***

(i) In general--(A) Benefits. In general, benefits subject to reimbursement under a plan must not discriminate in favor of highly compensated individuals. Plan benefits will not satisfy the requirements of this paragraph (c)(3)(i)(A) unless all the benefits provided for participants who are highly compensated individuals are provided for all other participants. In addition, all the benefits available for the dependents of employees who are highly compensated individuals must also be available on the same basis for the dependents of all other employees who are participants. A plan that provides optional benefits to participants will be treated as providing a

single benefit with respect to the benefits covered by the option provided that all eligible participants may elect any of the benefits covered by the option and there are either no required employee contributions or the required employee contributions are the same amount. This test is applied to the benefits subject to reimbursement under the plan rather than the actual benefit payments or claims under the plan. The presence or absence of such discrimination will be determined by considering the type of benefit subject to reimbursement provided highly compensated individuals, as well as the amount of the benefit subject to reimbursement.

(B) Maximum limits--(1) Uniformity rule. A plan may establish a maximum limit for the amount of reimbursement which may be paid a participant for any single benefit, or combination of benefits. However, except as otherwise provided in paragraph (c)(3)(i)(B)(2) of this section, any maximum limit attributable to employer contributions must be uniform for all participants and for all dependents of employees who are participants and may not be modified by reason of a participant's age or years of service.

(2) Exception to uniformity rule. With respect to an individual coverage HRA, as defined in §54.9802-4(b) of this chapter, if the maximum dollar amount made available varies for participants within a class of employees set forth in §54.9802-4(d) of this chapter, or varies among classes of employees offered the individual coverage HRA, the plan does not violate the requirements of this paragraph (c)(3) by virtue of that variance; provided that, within a class of employees, the maximum dollar amount made available varies only in accordance with the same terms requirement set forth in §54.9802-4(c)(3) of this chapter, and, with respect to differences in the maximum dollar amount made available for different classes of employees, each of the classes of employees is one of the classes of employees set forth in §54.9802-4(d) of this chapter. Specifically, with respect to age-based variances, in the case of an individual coverage HRA, if

the maximum dollar amount made available to participants who are members of a particular class of employees increases based on the age of each participant and the increases in the maximum dollar amount comply with the age-variation rule under the same terms requirement set forth under §54.9802-4(c)(3)(iii)(B) of this chapter, the plan does not violate the requirements of this paragraph (c)(3) with respect to those increases.

(C) Reference to employee compensation. If a plan covers employees who are highly compensated individuals, and the type or the amount of benefits subject to reimbursement under the plan are in proportion to employee compensation, the plan discriminates as to benefits.

* * * * *

(j) Applicability date. Section 105(h) and this section, except for paragraph (c)(3)(i)(B)(2) of this section, are applicable for taxable years beginning after December 31, 1979, and for amounts reimbursed after December 31, 1979. In determining plan discrimination and the taxability of excess reimbursements made for a plan year beginning in 1979 and ending in 1980, a plan's eligibility and benefit requirements as well as actual reimbursements made in the plan year during 1979, will not be taken into account. In addition, this section does not apply to expenses which are incurred in 1979 and paid in 1980. Paragraph (c)(3)(i)(B)(2) of this section is applicable for plan years beginning after December 31, 2019.

* * * * *

PART 54—PENSION EXCISE TAXES

Par. 3. The authority citation for part 54 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

§54.4980H-4 [Amended]

Par. 4. Section 54.4980H-4 is amended by removing “9.5 percent of” and adding in its place “the product of the required contribution percentage (as defined in §1.36B-2(c)(3)(v)(C) of this chapter) and” in the first sentence of paragraph (b)(1).

Par. 5. Section 54.4980H-5 is amended by:

- a. Revising paragraph (e)(2) introductory text;
- b. In paragraph (e)(2)(i):
 - i. Removing “an” and adding in its place “a general” in the heading; and
 - ii. Removing “affordability” and adding in its place “general affordability” in the first sentence;
- c. Removing “9.5 percent of” and adding in its place “the product of the required contribution percentage (as defined in §1.36B-2(c)(3)(v)(C)) and” in the first sentence of paragraphs (e)(2)(ii)(A) and (B), the first and second sentences of paragraph (e)(2)(iii), and the first sentence of paragraph (e)(2)(iv);
- d. In paragraph (e)(2)(v):
 - i. Adding a sentence to the end of the introductory text; and
 - ii. Designating Examples 1 through 6 as paragraphs (e)(2)(v)(A) through (F), respectively;
- e. In newly designated (e)(2)(v)(A) through (F), redesignating the paragraphs in the first column as the paragraphs in the second column:

Old Paragraphs	New Paragraphs
(e)(2)(v)(A)(i) and (ii)	(e)(2)(v)(A)(<u>1</u>) and (<u>2</u>)
(e)(2)(v)(B)(i) and (ii)	(e)(2)(v)(B)(<u>1</u>) and (<u>2</u>)
(e)(2)(v)(C)(i) and (ii)	(e)(2)(v)(C)(<u>1</u>) and (<u>2</u>)

(e)(2)(v)(D)(i) and (ii)	(e)(2)(v)(D)(<u>1</u>) and (<u>2</u>)
(e)(2)(v)(E)(i) and (ii)	(e)(2)(v)(E)(<u>1</u>) and (<u>2</u>)
(e)(2)(v)(F)(i) and (ii)	(e)(2)(v)(F)(<u>1</u>) and (<u>2</u>)

- f. Redesignating paragraphs (f) and (g) as paragraphs (g) and (h), respectively;
- g. Adding a new paragraph (f); and
- h. Revising newly redesignated paragraph (h).

The revisions and additions read as follows:

§54.4980H-5 Assessable payments under section 4980H(b).

* * * * *

(e) * * *

(2) Affordability safe harbors for section 4980H(b) purposes. The affordability safe harbors set forth in paragraphs (e)(2)(ii) through (iv) of this section (general affordability safe harbors) apply solely for purposes of section 4980H(b), so that an applicable large employer member that offers minimum essential coverage providing minimum value will not be subject to an assessable payment under section 4980H(b) with respect to any employee receiving the applicable premium tax credit or cost-sharing reduction for a period for which the coverage is determined to be affordable under the requirements of a general affordability safe harbor. The preceding sentence applies even if the applicable large employer member's offer of coverage that meets the requirements of a general affordability safe harbor is not affordable for a particular employee under section 36B(c)(2)(C)(i) and §1.36B-2(c)(3)(v) of this chapter, and an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to that employee. The general affordability safe harbors apply with respect to offers of minimum essential

coverage other than the offer of an individual coverage HRA, as defined in paragraph (f)(7) of this section. Paragraph (f) of this section sets forth affordability and minimum value safe harbors that apply to the offer of an individual coverage HRA (individual coverage HRA safe harbors).

* * * * *

(v) * * * For purposes of simplicity, the examples in this paragraph (e)(2)(v) assume 9.5 percent is the required contribution percentage for 2015 and 2016, although the required contribution percentage in 2015 and 2016 was adjusted for those years pursuant to §1.36B-2(c)(3)(v)(C) of this chapter.

* * * * *

(f) Affordability and minimum value safe harbors for individual coverage HRAs--(1) In general. Whether an offer of an individual coverage HRA is treated as affordable and providing minimum value, in general, is determined under §1.36B-2(c)(3)(i)(B), (c)(3)(vi), and (c)(5) of this chapter. This paragraph (f) sets forth safe harbors that an applicable large employer member may use in determining whether an offer of an individual coverage HRA is affordable and provides minimum value for purposes of section 4980H(b), even if the offer of the individual coverage HRA is not affordable and does not provide minimum value under §1.36B-2(c)(3)(i)(B), (c)(3)(vi), and (c)(5) of this chapter. An applicable large employer member that offers an individual coverage HRA is not subject to an assessable payment under section 4980H(b) with respect to any full-time employee receiving the applicable premium tax credit or cost-sharing reduction for a period for which the individual coverage HRA is determined to be affordable and to provide minimum value applying the safe harbors provided in this paragraph (f). The preceding sentence applies even if the applicable large employer member's offer of an individual coverage HRA that is affordable and provides minimum value

applying the safe harbors under this paragraph (f) is not affordable and does not provide minimum value for a particular employee under §1.36B-2(c)(3)(i)(B), (c)(3)(vi), and (c)(5) of this chapter, and an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to that employee. To the extent not addressed in this paragraph (f), the rules under §1.36B-2(c)(3)(i)(B), (c)(3)(vi), and (c)(5) of this chapter apply in determining whether an offer of an individual coverage HRA is affordable and provides minimum value for purposes of section 4980H(b). An applicable large employer member may rely on information provided by an Exchange in determining whether the offer of an individual coverage HRA is affordable and provides minimum value. See paragraph (f)(7) of this section for definitions that apply to this paragraph (f), which are in addition to the definitions set forth in §54.4980H-1(a).

(2) Conditions of using an individual coverage HRA safe harbor. An applicable large employer member may use one or more of the safe harbors described in this paragraph (f) only with respect to the full-time employees and their dependents to whom the applicable large employer member offered the opportunity to enroll in an individual coverage HRA. The safe harbors in this paragraph (f) apply only to the offer of an individual coverage HRA, but to the extent an applicable large employer member offers some full-time employees and their dependents an individual coverage HRA and other full-time employees and their dependents other coverage under an eligible employer-sponsored plan that provides minimum value with respect to the self-only coverage offered to the employee, the applicable large employer member may use the safe harbors under this paragraph (f) for the offers of the individual coverage HRA and the general affordability safe harbors under paragraph (e)(2) of this section for the offers of other coverage. Use of any of the safe harbors in this paragraph (f) is optional for an applicable large employer member, and an applicable large employer member may choose to apply the safe

harbors for any class of employees (as defined in paragraph (f)(7) of this section), provided it does so on a uniform and consistent basis for all employees in the class of employees. Each of the safe harbors set forth in this paragraph (f) may be used in combination with the other safe harbors provided in this paragraph (f), subject to the conditions of the safe harbors.

(3) Minimum value. An individual coverage HRA that is affordable for a calendar month under §1.36B-2(c)(5) of this chapter, taking into account any applicable safe harbors under this paragraph (f), is treated as providing minimum value for the calendar month, for purposes of section 4980H(b).

(4) Look-back month safe harbor—(i) In general. In determining an employee's required HRA contribution for a calendar month, for purposes of section 4980H(b), an applicable large employer member may use the monthly premium for the applicable lowest cost silver plan for the month specified in either paragraph (f)(4)(i)(A) or (B) of this section, as applicable (the look-back month):

(A) Calendar year plan. For an individual coverage HRA with a plan year that is the calendar year, an applicable large employer member may use the monthly premium for the applicable lowest cost silver plan for January of the prior calendar year.

(B) Plan year that is not the calendar year. For an individual coverage HRA with a plan year that is not the calendar year, an applicable large employer member may use the monthly premium for the applicable lowest cost silver plan for January of the current calendar year.

(ii) Application of look-back month safe harbor to employee's current circumstances. In determining the monthly premium for the applicable lowest cost silver plan based on the applicable look-back month, the applicable large employer member must use the employee's applicable age for the current plan year and the employee's applicable location for the current

calendar month. In general, the applicable large employer member may use the monthly premium of the applicable lowest cost silver plan for the applicable look-back month for all calendar months of the plan year. However, if the employee's applicable location changes during the plan year, as determined in accordance with the rules set forth under paragraph (f)(6) of this section if applicable, although the applicable large employer member may continue to determine the monthly premium based on the applicable look-back month, the applicable large employer member must use the employee's new applicable location to determine the applicable lowest cost silver plan used to determine the monthly premium.

(5) Application of the general affordability safe harbors to individual coverage HRAs.

The general affordability safe harbors set forth in paragraphs (e)(2)(ii), (iii), and (iv) of this section may apply to an offer of an individual coverage HRA by an applicable large employer member to a full-time employee for purposes of section 4980H(b), subject to the modifications set forth in this paragraph (f)(5).

(i) Form W-2 safe harbor applied to individual coverage HRAs. An applicable large employer member satisfies the Form W-2 safe harbor of paragraph (e)(2)(ii) of this section with respect to an offer of an individual coverage HRA to an employee for a calendar year, or if applicable, part of a calendar year, if the individual coverage HRA is affordable under the Form W-2 safe harbor under paragraph (e)(2)(ii) of this section but substituting "the employee's required HRA contribution, as determined taking into account any other safe harbors in paragraph (f) of this section, if applicable" for each of the following phrases -- "that employee's required contribution for the calendar year for the employer's lowest cost self-only coverage that provides minimum value", "the required employee contribution", "the employee's required

contribution”, and “the employee’s required contribution for the employer’s lowest cost self-only coverage that provides minimum value.”

(ii) Rate of pay safe harbor applied to individual coverage HRAs. An applicable large employer member satisfies the rate of pay safe harbor of paragraph (e)(2)(iii) of this section with respect to an offer of an individual coverage HRA to an employee for a calendar month if the individual coverage HRA is affordable under the rate of pay safe harbor of paragraph (e)(2)(iii) of this section but substituting “the employee’s required HRA contribution, as determined taking into account any other safe harbors in paragraph (f) of this section, if applicable,” for “the employee’s required contribution for the calendar month for the applicable large employer member’s lowest cost self-only coverage that provides minimum value.”

(iii) Federal poverty line safe harbor applied to individual coverage HRAs. An applicable large employer member satisfies the Federal poverty line safe harbor of paragraph (e)(2)(iv) of this section with respect to an offer of an individual coverage HRA to an employee for a calendar month if the individual coverage HRA is affordable under the federal poverty line safe harbor of paragraph (e)(2)(iv) of this section but substituting “the employee’s required HRA contribution, as determined taking into account any other safe harbors in paragraph (f) of this section, if applicable,” for “the employee’s required contribution for the calendar month for the applicable large employer member’s lowest cost self-only coverage that provides minimum value.”

(6) Location safe harbor--(i) In general. For purposes of section 4980H(b), an applicable large employer member may determine an employee’s required HRA contribution for a calendar month based on the cost of the applicable lowest cost silver plan for the location of the employee’s primary site of employment.

(ii) Primary site of employment--(A) In general. An employee's primary site of employment generally is the location at which the applicable large employer member reasonably expects the employee to perform services on the first day of the plan year (or on the first day the individual coverage HRA may take effect, for an employee who is not eligible for the individual coverage HRA on the first day of the plan year). However, the employee's primary site of employment is treated as changing if the location at which the employee performs services changes and the employer expects the change to be permanent or indefinite; in that case, in general, the employee's primary site of employment is treated as changing no later than the first day of the second calendar month after the employee has begun performing services at the new location. Nonetheless, if an applicable large employer member is first offering an individual coverage HRA to a class of employees, and the change in location occurs prior to the individual coverage HRA's initial plan year, the employee's primary site of employment is treated as changing no later than the later of the first day of the plan year or the first day of the second calendar month after the employee has begun performing services at the new location.

(B) Remote workers. In the case of an employee who regularly performs services from home or another location that is not on the applicable large employer member's premises, but who may be required by his or her employer to work at, or report to, a particular location, such as a teleworker with an assigned office space or available workspace at a particular location to which he or she may be required to report, the location to which the employee would report to provide services if requested is the primary site of employment. In the case of an employee who works remotely from home or at another location that is not on the premises of the applicable large employer member and who otherwise does not have an assigned office space or a particular location to which to report, the employee's residence is the primary site of employment. An

employee's assigned office space or available workspace for purposes of this paragraph (f)(6)(ii)(B) must be a location at which the employee may reasonably be expected to report on a daily basis, if required. For purposes of this paragraph (f)(6)(ii)(B), an applicable large employer member may rely on the residence information reported by an employee, unless the applicable large employer member has knowledge that the residence information reported by an employee is incorrect.

(1) Examples. The following examples illustrate the application of the rules under paragraph (f)(6)(ii)(B) to applicable large employer members that offer an individual coverage HRA to at least some of their full-time employees. For purposes of the examples, assume that the particular workspace assignment policy applies to each employee for the entire year and that none of the employees change residences during the year.

(i) Example 1 (Location safe harbor applied to a remote worker who may be required to work at, or report to, a particular location)--(A) Facts. Employees A, B, C, and D regularly perform services from home. Employer Y requires Employees A, B, C, and D to work at, or report to, Employer Y's headquarters if requested. Employer Y's headquarters is a location at which Employees A, B, and C may reasonably be expected to report on a daily basis. Employer Y's headquarters is not a location at which Employee D may reasonably be expected to report on a daily basis. Employer Y requests that Employee A report to Employer Y's headquarters one day per week. Employer Y requests that Employee B report to Employer Y's headquarters only for a single two-daywork event for the year. While Employee C is required to work at, or report to, Employer Y's headquarters if requested, Employer Y never requests during the year that Employee C work at, or report to, Employer Y's headquarters. Employer Y requests that Employee D report to Employer Y's headquarters once per quarter.

(B) Conclusion. The primary site of employment for the year for Employees A, B, and C is Employer Y's headquarters. The primary site of employment for the year for Employee D is Employee D's residence.

(ii) Example 2 (Location safe harbor applied to a remote worker who is not required to work at, or report to, a particular location)--(A) Facts. Employees E and F regularly perform services from home. Employer Z does not require Employees E and F to work at, or report to, a particular location if requested. Employees E and F may be able to find an unassigned office space to work in at Employer Z's headquarters if they voluntarily go to Employer Z's headquarters on occasion. Employee E does not work at Employer Z's headquarters at any time during the year. Employee F voluntarily works in an unassigned office space at Employer Z's headquarters on occasion during the year.

(B) Conclusion. Employee E's primary site of employment for the year is Employee E's residence. Employee F's primary site of employment for the year is Employee F's residence.

(7) Definitions. The definitions in this paragraph (f)(7) apply for purposes of this paragraph (f).

(i) Applicable age. For an employee who is or will be eligible for an individual coverage HRA on the first day of the plan year, the employee's applicable age for the plan year is the employee's age on the first day of the plan year. For an employee who becomes eligible for an individual coverage HRA during the plan year, the employee's applicable age for the remainder of the plan year is the employee's age on the date the individual coverage HRA can first become effective with respect to the employee.

(ii) Applicable location. An employee's applicable location is the location at which the employee resides for the calendar month, or, if the applicable large employer member is applying

the location safe harbor under paragraph (f)(6) of this section, the employee's primary site of employment for the calendar month.

(iii) Applicable lowest cost silver plan—(A) In general. The applicable lowest cost silver plan for an employee for a calendar month generally is the lowest cost silver plan for self-only coverage of the employee offered through the Exchange for the employee's applicable location for the month.

(B) Different lowest cost silver plans in different parts of the same rating area. If there are different lowest cost silver plans in different parts of a rating area, an employee's applicable lowest cost silver plan is the lowest cost silver plan in the part of the rating area in which the employee's applicable location is located.

(C) Lowest cost silver plan identified for use for employees of all ages. The applicable lowest cost silver plan for an employee is the lowest cost silver plan for the lowest age band in the individual market for the employee's applicable location.

(iv) Class of employees. A class of employees means a class of employees as set forth in §54.9802-4(d)(2).

(v) Individual coverage HRA. An individual coverage HRA means an individual coverage HRA as set forth in §54.9802-4.

(vi) Required contribution percentage. Required contribution percentage means the required contribution percentage as defined in §1.36B-2(c)(3)(v)(C) of this chapter.

(vii) Required HRA contribution. In general, the required HRA contribution means the required HRA contribution as defined in §1.36B-2(c)(5)(ii) of this chapter. However, for purposes of the safe harbors set forth in this paragraph (f), the required HRA contribution is determined based on the applicable lowest cost silver plan as defined in paragraph (f)(7)(iii) of

this section and the monthly premium for the applicable lowest cost silver plan is determined based on the employee's applicable age, as defined in paragraph (f)(7)(i) of this section, and the employee's applicable location, as defined in paragraph (f)(7)(ii) of this section.

(8) Examples. The following examples illustrate the application of the safe harbors under this paragraph (f) to applicable large employer members that offer an individual coverage HRA to at least some of their full-time employees.

(i) Example 1 (Location safe harbor and look-back month safe harbor applied to calendar-year individual coverage HRA)--(A) Facts. For 2021, Employer X offers all full-time employees and their dependents an individual coverage HRA with a calendar-year plan year and makes \$6,000 available in the HRA for the 2021 calendar-year plan year to each full-time employee without regard to family size, which means the monthly HRA amount for each full-time employee is \$500. All of Employer X's employees have a primary site of employment in City A. Employer X chooses to use the location safe harbor and the look-back month safe harbor. Employer X also chooses to use the rate of pay safe harbor for its full-time employees. Employee M is 40 years old on January 1, 2021, the first day of the plan year. The monthly premium for the applicable lowest cost silver plan for a 40-year-old offered through the Exchange in City A for January 2020 is \$600. Employee M's required HRA contribution for each month of 2021 is \$100 (cost of the applicable lowest cost silver plan determined under the location safe harbor and the look-back month safe harbor (\$600) minus the monthly HRA amount (\$500)). The monthly amount determined under the rate of pay safe harbor for Employee M is \$2,000 for each month in 2021.

(B) Conclusion. Employer X has made an offer of affordable, minimum value coverage to Employee M for purposes of section 4980H(b) for each month of 2021 because Employee M's

required HRA contribution (\$100) does not exceed the amount equal to the required contribution percentage for 2021 multiplied by the monthly amount determined under the rate of pay safe harbor for Employee M (9.83 percent of \$2,000 = \$197). Employer X will not be liable for an assessable payment under section 4980H(b) with respect to Employee M for any calendar month in 2021. (Also, Employer X will not be liable for an assessable payment under section 4980H(a) for any calendar month in 2021 because it offered an individual coverage HRA, an eligible employer-sponsored plan that is minimum essential coverage, to all full-time employees and their dependents for each calendar month in 2021.)

(ii) Example 2 (Location safe harbor and look-back month safe harbor applied to non-calendar year individual coverage HRA)--(A) Facts. Employer W offers all full-time employees and their dependents an individual coverage HRA with a non-calendar year plan year of July 1, 2021 through June 30, 2022, and makes \$6,000 available in the HRA for the plan year to each full-time employee without regard to family size, which means the monthly HRA amount for each full-time employee is \$500. All of Employer W's employees have a primary site of employment in City B. Employer W chooses to use the location safe harbor and the look-back month safe harbor. Employer W also chooses to use the rate of pay safe harbor for its full-time employees. Employee N is 40 years old on July 1, 2021, the first day of the plan year. The monthly premium for the applicable lowest cost silver plan for a 40-year-old offered through the Exchange in City B for January 2021 is \$600. Employee N's required HRA contribution for each month of the plan year beginning July 1, 2021, is \$100 (cost of the applicable lowest cost silver plan determined under the location safe harbor and the look-back month safe harbor (\$600) minus the monthly HRA amount (\$500)). The monthly amount determined under the rate of pay safe harbor for Employee N is \$2,000 for each month of the plan year beginning July 1, 2021.

(B) Conclusion. Employer W has made an offer of affordable, minimum value coverage to Employee N for purposes of section 4980H(b) for each month of the plan year beginning July 1, 2021, because Employee N's required HRA contribution (\$100) does not exceed the amount equal to the required contribution percentage for plan years beginning in 2021 multiplied by the monthly amount determined under the rate of pay safe harbor for Employee N (9.83 percent of \$2,000 = \$197). Employer W will not be liable for an assessable payment under section 4980H(b) with respect to Employee N for any calendar month in the plan year beginning July 1, 2021. (Also, Employer W will not be liable for an assessable payment under section 4980H(a) for any calendar month in the plan year beginning July 1, 2021, because it offered an individual coverage HRA, an eligible employer-sponsored plan that is minimum essential coverage, to all full-time employees and their dependents for each calendar month in that plan year.)

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(h) Applicability date. Paragraphs (a) through (e) and (g) of this section are applicable for periods after December 31, 2014. Paragraph (f) of this section is applicable for periods after December 31, 2019.

Sunita Lough,
Deputy Commissioner for Services and Enforcement.

Approved: January 10, 2021

David J. Kautter,
Assistant Secretary of the Treasury (Tax Policy).